Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT MEMS, NATHANIAL KHALIQ, PHILLIP WEBB, THURMAN SMITH, AND BYRON BROWN,

Petitioners,

vs.

THE CITY OF ST. PAUL – DEPARTMENT OF FIRE AND SAFETY SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN NATIONAL RAILROAD PASSENGER CORPORATION V. MORGAN AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT REFUSED TO ALLOW APPELLANTS TO PRESENT EVIDENCE OF A RACIALLY HOSTILE WORK ENVIRONMENT DURING THE TRIAL.

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THIS CASE

On June 18, 1997, Petitioners commenced this lawsuit against the City of St. Paul Department of Fire and Safety alleging racial discrimination in violation of Title VII and the Minnesota Human Rights Act ("MHRA"). The United States District Court for the District of Minnesota granted summary judgment for the City. Mems v. The City of St. Paul-Department of Fire and Safety Services, 73 F.Supp. 2d 1031 (D. Minn. 1999).

All firefighters appealed to the Eighth Circuit Court of Appeals. The Court of Appeals determined that the District Court erred by granting the summary judgment on Appellant's disparate treatment claim, finding it undisputed that they produced evidence that they were members of a protected class, and they had produced evidence of unwelcome harassment based on their race which affected a term, condition, or privilege of their employment. Mems v. The City of St. Paul-Department of Fire and Safety Services, 224 F.3d 735(2000).

This case was then tried again before the District Court for the District of Minnesota where the District Court entered judgment upon jury verdict in favor of the city, with respect to the four firefighters, and entered judgment, upon jury verdict, awarding damages in the amount of one dollar in favor of one firefighter. Mems v. The City of St. Paul-Department of Fire and Safety Services, 2002 WL 334411 (D. Minn.)

All firefighters appealed. On appeal, the Eight Circuit Court of Appeals held that: (1) exclusion of expert testimony was warranted as sanction for firefighters' discovery violation; (2) any error excluding evidence was not prejudicial; (3) submission of jury instruction stating that the City claimed the African-American firefighters unreasonably failed to take advantage of corrective

opportunities was warranted; (4) hostile work environment instruction was not improper comment on the evidence; (5) damages jury instruction was not misleading; and (6) discrete acts of racial discrimination were not part of continuing violation. Mems v. The City of St. Paul- Department of Fire and Safety Services, 327 F.3d 771 (Minn. Ct. App. 2003) rehearing en banc denied (July 23, 2003).

STATEMENT OF THE BASIS FOR JURISDICTION IN THE UNITED STATES SUPREME COURT

On July 23, 2003, the United States Court of Appeals for the Eighth Circuit denied Appellant's request for rehearing En Banc. Petitioners appeal to this Court through this Petition for a Writ of Certiorari from this Court pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THIS CASE

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Minn. Stat. § 363.03. Unfair discriminatory practices

Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

* * *

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or(b) to discharge an employee;or(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

* * *

Subd. 7. Reprisals. It is an unfair discriminatory practice for any individual who participated in the alleged discrimination as a perpetrator, employer, labor organization, employment agency, public accommodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate salesperson, or employee or agent thereof to intentionally engage in any reprisal against any person because that person: (1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter; or (2) Associated with a person or group of persons who are disabled or who are of different race, color, creed, religion, sexual orientation, or national origin. A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an

employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

Federal Rules of Evidence, Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Petitioners Mems, Khaliq, Brown and Smith were Plaintiffs in a lawsuit alleging discrimination against the City of St. Paul Department of Fire and Safety Services between 1975 and 1991. When the settlement was announced, Petitioners worked at St. Paul Fire Station 20 on the racially segregated "B" shift. The "B" shift included six African-American men and two Caucasian men. The "A" shift consisted of all Caucasian men. As set out below, each of the Petitioners offered testimony to the District Court regarding the racially hostile work environment they endured following the settlement of the 1992 lawsuit.

Just six weeks after the settlement of the 1992 lawsuit was announced, on August 30, 1994, Appellant Thurman Smith was falsely accused by an "A" shift firefighter of coming to work under the influence of alcohol. He was exonerated after a humiliating breath test performed by the district chief in front of the crew. Shortly after the incident with Smith, the A shift committed a series of retaliatory actions against the B shift. The "A" shift sabotaged several items in the fire station, moved and hid cooking utensils, left the windows open in the winter time and turned the heat way up when the "B" shift would come to duty. In addition, "A" shift Captain would often conduct a 'white glove' inspection of the fire department as "B" shift was coming off duty and "A" shift was coming on duty.

This hostile conduct continued into 1995. In January 1995, the A shift complained that members of the "B" shift were at the station after their shift ended. This resulted in a directive from the officers to the "B" shift to leave the station by 8:00 a.m., the time of the shift change. An order such as this had never been made before. Shortly, thereafter, Mems and Khaliq filed race discrimination claims concerning this order.

On or about February 4, 1995 an email was sent out by a Caucasian firefighter ridiculing the African-American firefighters and their settlement. The email stated, "I feel that I can fully accept [sic] the healing process much easier for [redaction]. That would help me greatly work together in a relaxed mode. Petitioners complained about this email, as it was offensive and in violation of the City's rules on the use of the email system. This firefighter was never disciplined.

In approximately February 1995, Appellant Robert Mems' fire gear and fire rig were sabotaged. The lining was ripped out of his fire helmet, the hook to secure his bunker pants was ripped off and the fire apparatus which he drove was left in pump mode so that the apparatus would not move. Next, two offensive photographs were placed on the bulletin board at the station by members of the "A" shift. One of the photographs depicted an "A" shift captain, Ness, and firefighter, Wieczorek, with their middle fingers raised. A note posted by the pictures stated: "This is our position on the whole thing." Id. The picture and accompanying note were highly offensive to the African American members of the "B" shift, as a reference to their 1992 lawsuit. They felt it was as if the A shift was further flaunting their hostile attitude on the prior settlement in the faces of the "B" shift employees. Id. Captain Ness received an oral reprimand, the lowest form of discipline for this posting.

During the summer of 1995, "A" shift firefighter Pat McCardle set Appellant Phillip Webb up to miss two fire runs. For a period of years, McCardle always relieved Webb when he arrived at the station in the morning, even if it was before the 8:00 a.m. shift change. Then, without saying a word to Webb, McCardle refused to take two fire runs which came in before 8:00 a.m.

In the winter of 1995, due to unresolved racial tensions, Webb filed a race harassment claim regarding this incident with the St. Paul City Department of Human

Rights. "B" shift Captain Dubois assisted firefighter Webb with his complaint, which caused him in 1996 to file his own complaint of racial harassment against the City. In Dubois' complaint, he explained how he was treated poorly as his shift because he stood up for them and wouldn't allow them to be harassed.

In early 1996, The lug nuts on the tires of Appellant Webb's truck were loosened while parked at work, almost causing him an accident. Appellant Khaliq also left work one day to find his car, which was parked in the Fire Department parking lot, scratched and his fender bent.

The St. Paul Human Rights Department investigated this incident, and found probable cause to believe that McCardle's actions were retaliatory for the settlement of the 1992 lawsuit and for the disciplinary action taken against Captain Ness for the posting of the pictures. The Human Rights Department also found probable cause to believe that McCardle violated the Workplace Conduct Policy by not informing Webb that he was not taking the runs when he had relieved Webb under similar circumstances for the prior 7 to 8 years. Id. In response to these findings, Assistant Chief Carter drafter a letter reprimanding McCardle for acting in a retaliatory manner toward Webb. This letter was never sent to McCardle. Instead, Carter thought he should look at things a little deeper because he could not find a standard operating procedure that had been violated. Later, Carter sent a letter to McCardle stating that his acts were not based on race and there was insufficient evidence of retaliation to support disciplinary action.

In spring of 1996, members of the A shift left racist cartoons and articles from the Conservative Chronicle in conspicuous places at station 20 at the conclusion of their shift so that the materials would be seen by oncoming members of the "B" shift. These materials ridiculed African-Americans and were highly offensive to Petitioners and was a violation of the City's harassment

policy.

During the summer of 1996, a basketball hoop primarily used by the "B" shift was vandalized on at least three occasions.

In the fall of 1996, Smith was falsely accused of possessing drugs in his locker. An "A" shift firefighter reported to Captain Ross claimed that Smith had what appeared to be rock cocaine in his locker. Carlisle denied making the report. After the A shift captain made the allegation to Assistant Chief Carter, Carter contacted the police. The police confronted Smith at the fire station, searched his person and then searched his locker. The search, which Smith voluntarily consented to, yielded no drugs.

On October 30, 1996, Mems, as the president of the Black Firefighters United Organization, sent a letter to the NAACP. The Organization requested on behalf of African-American firefighters included Petitioners, that the NAACP conduct an independent investigation regarding the concerns they had with the racially hostile environment because they weren't getting any results with the City. On or about November 5, 1996, a race harassment/discrimination claim was filed with the Equal Employment Opportunity Commission, on behalf of the black firefighters.

In December 1996, Khaliq found two of his magazines American Legacy and Al Jumuah intentionally destroyed. The Al Jumuah magazine had grease all over it and had been thrown into the trash. Id. The cover of the American Legacy magazine--whichdepicted a national guardsman holding the hand of a small African-American child--was ripped in half. The half depicting the national guardsman was ripped into small pieces. "A" shift Captain Ness admitted he and firefighter McCardle may have looked through the magazines. Khaliq felt he had suffered yet another act of blatant racism, and filed a

complaint with the Assistant Chief Carter. But Assistant Chief Carter concluded that the damage was "inadvertent," and no reprimands were given.

Petitioners testified that the racial harassment and hostility in the workplace continued until they retired. Mems and Brown testified that, unlike Caucasian firefighters, they were required to wear their full turn out gear to fires. In December 1998, District Chief Zilliox denied Kahliq a meal hour over the Christmas holiday. As a result of this incident, Khaliq filed a racial harassment complaint against Zilliox.

Prior to trial, the District Court excluded testimony and evidence which was extraordinarily prejudicial to Petitioners and was in error. The trial court excluded a photograph depicting of "A"shift Captain Ness and a white Firefighter with their middle finger raised and the note posted next to the picture stating "this is our position on the whole thing." This photograph appeared shortly after the first discrimination lawsuit. The trial court excluded the photograph on the basis it was prejudicial. A-8 to A-12. The jury were only told there was a posting at Station 20 and Captain Ness was reprimanded. The picture and the note were highly offensive to the African American members of "B"shift.

Petitioners offered testimony and evidence regarding a carving of a hangman noose they heard about and/or saw. The trial court excluded the carving for several reasons, including foundation and relevancy.

Additionally, the trial court excluded several degrading and hostile comments made by "A" shift Captain Ness to "B"shift Captain DuBois. Specifically, Ness called DuBois a "F—idiot" when DuBois wouldn't agree to a "division" in work that would resulted in three times as much work for "B" shift as for "A" shift. Later, DuBois would have testified he felt Ness' comments were motivated by discriminatory feelings about the minorities

working on his shift. Id. The trial court excluded this testimony claiming the statements were unrelated to Appellant's case.

The trial court also excluded corroborating and supportive testimony, including evidence that the City's investigation of Smith was racially motivated. Smith would have offered evidence regarding treatment of a white firefighter who had been accused of drug use. The trial court excluded this testimony as hearsay, and broadly applied this order to any other documents that referenced any incidents or allegations of drug use by white firefighters. A-8.

Further, the trial court excluded Dr. John Taborn's testimony. At the pre-trial stage the City challenged the introduction of Dr. Taborn as an expert witness. The trial court conducted a Daubert hearing and denied the City's motion. To ensure Dr. Taborn's testimony would appropriately comport with the trial court's order, Appellant's saw Dr. Taborn during the recess week of trial. Dr. Taborn took notes of his meetings with Petitioners which were immediately produced to the City. The City objected to the disclosure on the basis of timeliness and characterized the notes as a subsequent report. The trial court granted the motion, finding the disclosure to be untimely. The trial court then reconsidered and reversed its earlier Daubert ruling. A-16 to A-17.

Lastly, the trial court incorrectly precluded Petitioners from offering evidence of their early retirement and failure to take promotional exams. A. 19. Petitioners were using this evidence only to show the hostile work environment denied them their opportunity to take promotional exams and they retired early due to the City's discriminatory acts. The trial court excluded this evidence based on the incorrect belief that Petitioners were reviving their disparate impact claim. Id. Finally, the trial court limited Petitioners' potential recovery period

under Title VII and the Minnesota Human Rights Act to illegal acts of discrimination that occurred only within the one year from the date that Appellants filed a claim with the Equal Employment and Opportunity Commission ("EEOC"). A-18 to A-20.

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE EIGHTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THIS COURT'S DECISION IN NATIONAL RAILROAD PASSENGER CORPORATION V. MORGAN AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

A. Damage Period Was Improperly Limited

In the case at bar, the district court limited the damage period to acts occurring within the one-year statute of limitations period. The district court justified the narrow damages period by noting that there was no Minnesota case law on the issue and that the rationale for allowing damages to be recovered only for events occurring within the limitations under 42 U.S.C. 2000e et seq. (hereafter "Title VII") in Madison v. IBP, Inc., 257 F.3d. 780, 796-97 (8th Cir. 2001) vacated and remanded, 122 S.Ct. 2583 (2002) applied similarly to the Minn. Stat. § 363.03 ("MHRA"). However, while the appeal of this case was pending, this Court vacated the Madison decision in light of its decision in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002).

The Eight Circuit determined that the correct damages period to be applied depends upon how National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002) affects the case at bar. However, the Eighth Circuit, by limiting the number of Appellants who were entitled to the benefit of this Court's ruling, incorrectly held that the acts constituting unlawful employment practice were characterized as discrete,

rather then hostile working environment and narrowed the damages period. In doing so, the Eight Circuit and the district court decisions conflict with this Court's decision in Morgan concerning what constitutes a "hostile working environment."

In Morgan, this Court determined that a discrete retaliatory act or discriminatory act "occurred on the day it happened." 536 U.S at 110, 122 S.Ct. at 2070. Examples of discrete acts include "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire." Id. at 114, 2073. "Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Id. Each discrete discriminatory act starts a new clock for filing charges alleging that act and therefore must be filed within the time period after discrete discriminatory act occurred. Id. at 113, 2072.

Hostile work environment claims are very different in kind from discrete acts. In Morgan, this Court described claims based upon hostile work environment as:

> "[t]heir very nature involves repeated conduct. The unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

Id. 536 U.S. at 115, 122 S.Ct at 2073. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993) ("As we pointed out in Meritor Savings Bank, FSB v. Vinson 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)] 'mere utterance of an .... epithet which engenders offensive feelings in a[n] employee,' ibid (internal quotations mark omitted) does not sufficiently affect the conditions of employment to implicate Title VII")

When there is a hostile work environment, for

purpose of determining timely filing, it does not matter that some of the component acts of the hostile work environment fall outside the statutory time period. According to Morgan:

> "It does not matter, for the purposes of the statute, that some of the acts of the hostile work environment fell outside the statutory period. Provided that an act contributing to the claims occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.

Id., 536 U.S. at 117, 122 S.Ct. at 2074.

In Morgan, the plaintiff presented evidence from a number of employees that managers made racial jokes, performed racially derogatory acts, made negative comments regarding the capacity of blacks to be supervisors and used various racial epithets. Id., 536 U.S. at 120, 122 S.Ct. at 2076.

In the case at bar, it is clear merely by looking at the evidence itself that the acts resemble the conduct this Court in Morgan characterized as a hostile working environment. Here, the racial hostility started in 1994 when the first racial discrimination lawsuit was settled. Smith was falsely accused of coming to work under the influence. The "A" shift sabotaged several items in the fire station that belonged to the "B" shift. The hostility continued in to 1995 through 1996 when offensive email was sent out by a Caucasian firefighter ridiculing the African-American firefighters and their settlement which was in violation of the City's rules; Mems' fire gear and rig was sabotage; offensive photographs were placed on bulletin boards at the Station; an "A" shift firefighter set up Webb to miss two fire runs; and lug nuts were loosen on Appellant's truck. In 1996, racists cartoons and articles were left in conspicuous places at the station so it would

be seen by all firefighters; a basketball hoop was vandalized; more false accusations were made; and magazines were intentionally destroyed. Finally, even the evidence that was excluded further proves the hostile environment the Petitioners experienced.

Collectively, these incidents show a racially hostile work environment rather then a discrete act. Therefore, the Petitioners are entitled to damages occurring outside the statutory period for those acts that constitute the hostile work environment. Id., 536 U.S. at 118-119, 122 S.Ct. at 2075. It is on this point that the Eighth Circuit Court of Appeals erred. First, the Eighth Circuit Court of Appeals attempted to avoid applying this Court's holding in Morgan, by ruling that all of the Plaintiffs, except Plaintiff Webb, were not affected by Morgan because Morgan only involved the issue of damages and the jury did not reach the issue of damages for the other Plaintiffs. Mems v. City of St. Paul, Department of Fire and Safety Services, 327 F.3d 771, 783 (8th Cir. 2003). This position is erroneous because, in the words of Judge Heaney in the dissent:

> The majority recognizes that the district court used the wrong legal analysis, yet holds Appellants are not entitle to relief. In so doing, the majority posits that our analysis should be limited to Webb because he is the only plaintiff to recover damages. This is simply incorrect. *Morgan*, in fact, announced the opposite proposition: the plaintiff *need not* prove damages occurred within the statutory period so long as any act contributing to the hostile work environment did. . . .
>
> Each of the plaintiffs satisfied Morgan's threshold requirement of alleging some act contributing to the hostile work environment that is not time-barred. Accordingly, each of the plaintiffs was the victim of trial error when the court limited their respective damages periods. This error prevented

> the jury from fully considering numerous acts that occurred in 1994, 1995, and, for some of the plaintiffs, in 1996. Obviously, consideration of these acts may have changed the jury's mind. I therefore believe that a new trial is appropriate for all Appellants, with the district court employing the analysis put forth by the Supreme Court in *Morgan.*

Id. at 787. (*Emphasis original*) (citations omitted).

Secondly, after excluding all of the Plaintiffs except Plaintiff Webb, the Eighth Circuit Court of Appeals then considered only those acts of racial hostility that occurred to Plaintiff Webb and found that these acts were discrete acts. Id. at 785. The Eighth Circuit then ruled that under Morgan, Plaintiff Webb would not be entitled to revive pre-limitations acts because the acts falling within the damages period were discrete acts. Id. The Eighth Circuit made this finding despite both binding and persuasive case law where the Courts have consistently held that incidents of harassment directed at employees other than the plaintiff-employee to prove a hostile work environment claim. See, e.g., Carter v. Chrysler Corp., 173 F.3d 693, 701 n. 7 (8th Cir. 1999) (finding that evidence which was not directly observed by the plaintiff would still be relevant on whether a hostile environment existed and whether the Plaintiff perceived other conduct to be hostile or abusive)(citing Schwapp v. Town of Avon, 118 F.3d 106, 111-112 (2d Cir. 1997); Hicks v. Gates, 883 F. 2d 1406, 1415 (10th Cir. 1987)(emphasis added); see also Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1015 (8th Cir. 1988)(finding that evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment); Johns v. Harborage I, Ltd., 585 N.W.2d 853, 861 (Minn. App. 1998). As a result, the Eighth Circuit's position is clearly improper.

Clearly, the Eighth Circuit Court of Appeals misapplied this Court's ruling in Morgan to all of the Plaintiffs. Consequently, this Court must grant Plaintiffs'

Petition for Writ of Certiorari in order to maintain consistency in the law and to settle this important question of federal law.

B. Dr. Taborn's Testimony Should Never Have Been Excluded

This point is related to the discussion above about the limitation period for damages under this Courts holding in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002). As discussed, during the trial, the trial court issued an erroneous ruling limiting the period for damages for each of the Plaintiffs to one year prior to the date each Plaintiff filed a claim with the EEOC. A-18 to A-20. As Dr. John Taborn was scheduled to testify, in part, about the damage to each Plaintiff as a result of the racially hostile work environment within the fire department. To ensure Dr. Taborn's testimony would appropriately comport with the Court's erroneous order, Plaintiff's counsel arranged for the Plaintiffs to see Dr. Taborn during the recess week of trial so that Dr. Taborn could attempt to determine how each Plaintiff was injured by acts within the one-year period preceding each Plaintiffs' EEOC filing. Appellants' counsel did not ask Dr. Taborn for an additional report, nor did Dr. Taborn produce an additional report. Dr. Taborn took notes of his meetings with the appellants, which Appellants' counsel produced to the City's counsel.

The City objected to the disclosure of the notes on the basis of timeliness and characterized the notes as a subsequent report. The City alleged that Dr. Taborn's testimony had been "poisoned" and moved for the exclusion of Dr. Taborn's testimony. Plaintiffs were obviously in a "no win" situation. If Dr. Taborn had unknowingly testified about injuries that were outside of the trial court's erroneous one-year prior to the EEOC filing period, his testimony would have been excluded. If Dr. Taborn had not seen each Plaintiff to determine what injuries were experienced within the limitations period set

by the trial court, he would have been subjected to criticism that his testimony was based partially upon damages that were erroneously excluded by the trial court. Consequently, it was the trial court's incorrect ruling under Morgan that placed Plaintiffs in the position that the trial court found objectionable. Nevertheless, the trial court granted the Defendant's motion to exclude Dr. Taborn, and the trial court reversed its ruling on the Daubert hearing. A-16 to A-17.

When the exclusion of Dr. Taborn's testimony was reviewed by the Eighth Circuit Court of Appeals, the Eighth Circuit ruled that the trial court was within its discretion in excluding Dr. Taborn's testimony for failure to comply with discovery. Mems, 327 F.3d at 780. Unfortunately, the Eighth Circuit did not discuss the fact that Plaintiffs were required to return to see Dr. Taborn in the first place because the trial court issued an erroneous ruling regarding the damages period. As a result, the Eighth Circuit Court of Appeals also misapplied this Court's ruling in Morgan. Consequently, this Court must grant Plaintiffs' Petition for Writ of Certiorari in order to maintain consistency in the law and to settle this important question of federal law.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DISTRICT COURT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS WHEN IT REFUSED TO ALLOW APPELLANTS TO PRESENT EVIDENCE OF A RACIALLY HOSTILE WORK ENVIRONMENT DURING THE TRIAL

Even though trial courts are given leeway in making evidentiary rulings, including those made pursuant to Federal Rules of Evid., Rule 403, the court's exercise of its discretion must not unfairly prevent a party from proving his case. Estes v. Dick Smith Ford, Inc., 856

F. 2d 1097, 1102-03 (8th Cir. 1988); see also Anderson v. Malloy, 700 F.2d 1208, 1212 (8th Cir. 1983)(trial court's "discretion in deciding whether to admit or exclude evidence. . . 'does not sanction exclusion of competent evidence without a sound, practical reason'" (citation omitted)). Similarly, "[a] plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries." Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

Under Title VII and the MHRA, Appellants were required to establish a prima facie case of a hostile work environment. To establish a prima facie case in a hostile work environment claim, the employee must show (1) membership in a protected group; (2) the occurrence of unwelcome harassment; (3) a causal nexus between the harassment and the claimant's membership in a protected group; (4) that the harassment affected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999). Both before and during trial, Appellants submitted evidence to establish the elements listed above. The district court's rulings, however, unfairly prevented Appellants from the use of evidence that would have either established their prima facie case or create an inference of discrimination. This was an abuse of discretion.

A. Photograph Of Ness And Wieczorek And The Reason For Ness' Reprimand

To establish the elements of their prima facie case, Appellants offered two photographs that were placed on the bulletin board at Station 20 by members of the "A" shift. The photograph depicted "A" Shift Captain Ness and "A" shift firefighter Wieczorek with their middle

finger raised. A note posted next to the pictures stated "this is our position on the whole thing." During Appellant Brown's deposition, he testified as to what he thought the photograph said: "To me it says f--- you ---".

Anticipating that this testimony would come forth during trial, the City argued in its pretrial motion that it should be excluded based on Fed.R.Evid. 403. The City conceded that the whether or not the photograph communicated "f--- you" should be disputed at trial but testimony regarding "----" was too prejudicial. At no point, however, was it contemplated or argued that the photograph itself should be excluded based on prejudice–rather the parties justifiably assumed that the photograph would be entered into evidence, and thus, argued over the scope of testimony concerning the photograph.[1]

In fact, Appellants specifically argued that the evidence should not be excluded because it directly supported an element of their claim. That is, according to the law in under the MHRA or Title VII, a plaintiff-employee must establish both an objective and subjective offensive environment. Carter, 173 F.3d at 701-02. Appellants also argued that the evidence would establish that the harassment was severe and pervasive; that the City had knowledge of the harassment; and that the City failed to take prompt remedial action. See White v. Honeywell, 141 F.3d 1270, 1276 (8th Cir. 1998). Therefore, the impression or perceptions inferred from the photograph were a required element of Appellants' case

[1] The City argued that the exclusion of the actual photograph was part of its global motion to exclude all evidence outside the statute of limitations period. The Court denied that request and the City never asked for the photograph to be excluded based on prejudice. Trial Tr. 556.

and therefore admissible.

Nonetheless, in its pretrial Order, the trial court excluded the photograph along with the Appellants' testimony. A-8 to A-9. The trial court argued that the probative value of the photograph was outweighed by the prejudice caused by the racial invective used by Appellant Brown. Id.

This issue was revisited during trial when Appellants made an offer of proof on the photograph. Again, Appellants argued that the photograph should be admitted along with the testimony surrounding it but agreed to limit the testimony of Appellant Brown so as to exclude the use of the "racial invective" at issue. At a minimum, Appellants' counsel argued, the photograph should be admitted in some manner because the posting of the photograph and the reprimand were a triggering event for subsequent acts of harassment and discrimination.

Ultimately, the trial court affirmed its earlier ruling but determined that Appellants could testify that there was a posting at Station 20 and that Captain Ness was reprimanded.

By its rulings, the trial court excluded: 1) the actual photograph which Appellants had offered as a demonstrative exhibit, 2) the content of the photograph–"A" shift Captain Ness and firefighter Wieczorek "flipping the bird" along with the note posted next to the photograph stating "this is our position on the whole thing," and 3) the stated reason the City reprimanded Captain Ness- a violation of SOP 202.1, pg. 4 of 5, Sexual or Ethnically Offensive Materials. The trial court's ruling also excluded any and all references to the photograph in other documentary evidence. Not only was the trial court's ruling unnecessary, it was erroneous.

The "racial invective" the trial court was concerned about was not in the photograph, it was only used to

describe the photograph. The supposed prejudice that may have been caused could have been remedied by simply limiting Appellants' testimony. Furthermore, in cases such as this, a plaintiff-employee must be given the chance to prove discrimination indirectly and circumstantially. Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987)(emphasis added). During trial, there was testimony regarding Captain Ness and his hostilities toward the "B" shift. There was also firefighter Wieczorek's admission that there were racial tensions in the Station. This evidence, coupled with the content of the photograph and the reason for Ness' reprimand, was probative evidence to further establish each Appellant's prima facie case, or at least create an inference of racial animus.

At a minimum, the photograph and reprimand were circumstantial evidence establishing a severe, pervasive racially hostile environment of which the City knew or should have known, and that the City failed to take prompt remedial action. Simply put, the trial court's ruling crippled Appellants' ability to prove the prima facie elements of their cases. Moreover, the Eighth Circuit Court of Appeals affirmed the trial court by ruling that the trial court has not abused its discretion in excluding the photographs.

B. Hangman Noose Carving At Station 18

In further support of their prima facie case, Appellants offered testimony and evidence concerning a hangman noose that was carved on a piece of furniture stored at Station 18, by firefighter Barry Harrison. Firefighter Harrison complained to Asst. Chief Carter about the carving. Appellants Mems and Khaliq also saw the carving and complained about it. Appellants attempted to enter testimony and evidence regarding this incident but the trial court essentially made a blanket ruling excluding such evidence.

It is well established law, within this Circuit, that evidence of harassment directed toward a co-worker is relevant and admissible in a Title VII or MHRA claim. See Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999). Furthermore, this type of evidence is admissible even if it is hearsay. Carter, 173 F.3d at 701 n. 7. Despite this binding and persuasive case law, the trial court improperly excluded Appellants' evidence.

Initially, Appellants attempted to question Assistant Chief Carter regarding firefighter Harrison's complaint and his investigation of the matter. The City objected on relevancy, surprise and prejudice. Noting that the testimony seemed irrelevant or "far afield" from Appellants' case, the trial court reserved the issue until foundation could be laid elsewhere. There were no foundational problems, however, because Asst. Chief Carter received the complaint about the carving and investigated it.

Next, Appellants attempted to address the issue during Khaliq's testimony. The City objected, arguing that the evidence was inadmissible hearsay. Appellants made an offer of proof that Khaliq and Mems had seen the carving and complained about it. The trial court excluded the testimony but this time its ruling was based on hearsay/ foundation and relevancy. As Appellants argued, this evidence and testimony was not hearsay because at least two of the Appellants had first hand knowledge about the matter. Furthermore, the testimony was not offered for the truth of the matter asserted, but to establish that the harassment was severe and pervasive, and to establish that the City knew or should have known of the harassment and failed to take prompt remedial action. Finally, even if it was hearsay, this Circuit has permitted the use of "hearsay" evidence in order to establish harassment and/or discrimination cases. See Carter, 173 F.3d at 701 n.7; Trial Tr. 1448-1450.

Later that same day, Appellants provided the trial

court with a memorandum of law regarding the admissibility of harassment directed at other employees. Appellants provided both binding and persuasive case law where the trial courts have consistently held that incidents of harassment directed at employees other than the plaintiff-employee are admissible because a critical inquiry in a hostile work environment claim is the environment. See, e.g., Carter v. Chrysler Corp., 173 F.3d 693, 701 n. 7 (8th Cir. 1999) (finding that evidence which was not directly observed by the plaintiff would still be relevant on whether a hostile environment existed and whether the Plaintiff perceived other conduct to be hostile or abusive)(citing Schwapp v. Town of Avon, 118 F.3d 106, 111-112 (2d Cir. 1997); Hicks v. Gates, 883 F. 2d 1406, 1415 (10th Cir. 1987)(emphasis added); see also Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1015 (8th Cir. 1988)(finding that evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment); Johns v. Harborage I. Ltd., 585 N.W.2d 853, 861 (Minn. App. 1998).

In further support of their argument, Appellants cited Schwapp v. Town of Avon, 118 F.3d 106 (2d Cir. 1997) as an example of why the testimony should be admitted. In Schwapp, a Title VII race discrimination case, the Second Circuit noted that the plaintiff need not be present for every derogatory or harassing comment in order for those statements to be used as evidence of a hostile environment,

> the mere fact that Schwapp [plaintiff] was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim. Just as a racial epithet need not be directed at a plaintiff in order to contribute to a hostile work environment, see, e.g., Rodgers v. Western Southern Life Ins., Co., 12 F.3d 668, 673-75 (7th Cir. 1993), the fact that a plaintiff learns second hand of a racially derogatory

> comment or joke by a fellow employee or supervisor also can impact the work environment.

Schwapp, 118 F.3d at 111 (emphasis added).

Even while conceding that the law Appellants cited was valid, the trial court maintained its earlier ruling:

> Having reviewed the matter, I'm going to sustain the objection. I don't believe it's relevant to this proceeding, and I do believe that the Second Circuit law that you're citing is good law. The difference is that that occurred within a police station and it occurred in that same police station and not elsewhere.
>
> I think, in this case, to incorporate other things would be to diffuse the lawsuit into another lawsuit that's beyond the scope of this case, and I therefore sustain the objection.

This distinction is one without meaning and ignores the law. Neither Title VII nor the MHRA require any sort of proximity in order for the harassment to be actionable. The law does require, however, that the plaintiff-employee be allowed to show evidence of a hostile environment. Thus, the plaintiff-employee is permitted to offer evidence of general work atmosphere and co-worker conduct. See Hicks, 883 F.2d at 1415. Evidence of the carving and the testimony from the Appellants as to what they saw and heard and how they reacted to it is probative evidence of the hostile environment and its severity and pervasiveness. This evidence, as well as the outcome of Asst. Chief Carter's investigation, is also relevant to whether the City knew or should have known of the harassment and failed to take prompt remedial action. See Johns v. Harborage I. Ltd., 585 N.W.2d 853, 862 (Minn. App. 1998)(stating that an employer's knowledge of harassment against an employee other than the Appellant will assist the court in deciding whether the employer should have anticipated

the Appellants too would become a victim of the harassing employee's conduct.)

Finally, Appellants made one last offer of proof, but the trial court sustained its earlier ruling.

The trial court's rulings unfairly prevented the Appellants from establishing prima facie elements to their case. Testimony concerning the carving not only would have supported the "severe and pervasive requirement" claim, but would also have established that the City knew or should have known of the harassment. See Mason v. Southern Ill. University at Carbondale, 233 F.3d 1036, 1047 (7th Cir. 2000)(citing Wilson v. Chrysler Corp., 172 F.3d 500, 509 (7th Cir. 1999)(stating that "with respect to a hostile work environment claim predicated on coworker behavior, the pervasiveness or coworker conduct could show the employer's constructive notice of the harassment".)) The trial court's erroneous notions of relevancy and mistrust of the jury excluded probative evidence to prove their claims. Riordan, 831 F.2d at 697. Moreover, the Eighth Circuit Court of Appeals affirmed the trial court by ruling that the trial court has not abused its discretion in excluding the hangman's noose.

C. "A" Shift Captain Ness' Comments To "B" Shift Captain Dubois

The trial court similarly prevented Appellants from proving their case by excluding evidence of "A" shift Captain Ness' comments to "B" shift Captain Dubois. Exclusion of this evidence deprived Appellants the ability to rebut the City's claims that the problems in the Station were simply personality problems and/or to prove that the hostile environment was severe or pervasive and that the City had notice of the harassment.

Actionable discriminatory conduct may include conspicuous acts of racial animus, as well as more subtle conduct which can be tied to racial animus. As stated by the Eighth Circuit, "[a]ll instances of harassment need not

be stamped with signs of overt discrimination to be relevant under Title VII if they are part of a course of conduct which is tied to evidence of discriminatory animus." Carter, 173 F.3d at 701 (citing Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1014 (8th Cir. 1988)(other citations omitted)). Therefore, humiliating and intimidating behavior, though not overtly racist, may be fairly interpreted by the factfinder to be caused by the nexus to other more conspicuously discriminatory behavior. Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1997)(quoting Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992)).

The testimony offered involved a controversy where "B" shift Captain John DuBois refused to agree to an "A" shift proposal for the division of household labor. This "division" would have resulted in three times the work for the "B" shift. As a result of "B" shift Captain Dubois' action, "A" shift Captain Ness called DuBois a "f—ing idiot." Appellant proffered additional testimony from DuBois about this conversation, explaining that Ness said, "'Those guys again never do anything. I have a list this long of . . .' and then he stopped, he cut himself off. I think he realized it wasn't something he wanted to say and he just stopped right there and that was the end of our conversation." Id. Captain DuBois would have testified that he felt that Ness' comments, were motivated by discriminatory feelings about the minorities working on his shift. Id.

In its Memorandum and Order, the trial court excluded the evidence because it "is not sufficiently connected to the racial tensions alleged in this case to warrant its admissibility." A-10 to A-11. In addition, the trial court determined that such evidence would be misleading or confusing. Id.

Looking at the totality of the circumstances, it is simply wrong--in fact an abuse of discretion--to claim that the evidence of Ness' comment is not sufficiently related

to the racial tensions alleged in this case. There was testimony and evidence offered concerning "A" shift Captain Ness' involvement with allegations of racial hostility including: 1) appearing in the photograph; 2) receiving a reprimand pursuant to the City's Sexual and Ethnically Offensive Materials SOP; and 3) refusing to speak with "B" shift Captain Dubois. Further, "B" shift Captain Dubois testified that he was treated as poorly as his shift had been treated because he stood up for them. In fact, Dubois filed his own harassment claim because of his association with the African-American firefighters.

While Ness' comments may not have been overtly racist, in view of all the evidence, they could be tied to racial animus. At a minimum, the evidence showed that the comments were circumstantial evidence that the hostility was race based and created a hostile work environment. Moreover, these statements further establish that the hostility was severe or pervasive--so much so that it affected not only the Appellants, but even the non-minority firefighters who dared to associate with or stand up for African-American firefighters.

Finally, by excluding this testimony, the trial court erred--not only because it prevented the Appellants from establishing their prima facie case--but also because it denied Appellants the ability to further support testimony given by a uninterested third party which rebutted and contradicted the City's claim that the hostility was merely due to personality conflicts. See Duffy v. Clippinger, 857 F.2d 877 (1st Cir. 1988)(granting new trial based on new witnesses testimony because it was at odds with the defendant and the witness was relatively disinterested). By excluding this evidence, the trial court abused its discretion. Moreover, the Eighth Circuit Court of Appeals affirmed the trial court by ruling that the trial court has not abused its discretion in excluding the testimony described above.

D. Exclusion of Witnesses to Show Racial Motivation

As part of Plaintiff Khaliq's disparate treatment claim, he alleged several discriminatory and harassing acts taken on behalf of Chief Jack Zilliox. For example, Khaliq claimed that District Chief Zilliox refused to provide Khaliq with a meal break during the holiday season. Khaliq testified that these decisions and/or issues had to do with race. Id. In order to further establish racial motivation behind Zilliox's conduct, the City's knowledge of the harassment and its failure to take remedial action, Appellants offered testimony of other African-American firefighters who had experienced racial harassment on the part of Zilliox.

Specifically, Appellants offered testimony from Rodney Edwards regarding racial harassment he experienced while working for the City. Edwards would have testified that, unlike white firefighters, Zilliox criticized him for not wearing his uniform. After coming back from a medical run, Edwards removed his uniform and changed into work out clothes. Dist. Chief Zilliox told Edwards he wasn't dressed appropriately. Therefore, Edward's went upstairs and changed back into his uniform. As Edwards was coming down stairs, Zilliox physically confronted Edwards. The trial court excluded this evidence as improper rebuttal testimony, hearsay and confirmatory testimony.

This evidence would have aided Appellants in establishing that the hostility was severe and pervasive, See e.g. Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1015 (8th Cir. 1988); Hicks v. Gates, 883 F.2d 1406, 1415 (10th Cir. 1987); see also, Johns v. Harborage I. Ltd., 585 N.W.2d 853, 861 (Minn. App. 1998), and that the City knew or should have known of the harassment and failed to take prompt remedial action. See, Mason, 233 F.3d at 1047 (holding trial court did not abuse its discretion by admitting evidence of harassment and discrimination

involving other employees). This evidence offered by Appellant was proper rebuttal testimony as it would have rebutted the City's claim that race was not involved in its actions and those of Dist. Chief Zilliox. The trial court excluded this evidence. And again, the Appellants were prevented from presenting the jury with probative and relevant evidence to prove their prima facie case.

The trial court also excluded evidence in its order granting the City's motions in limine which prevented Appellant Smith from offering evidence that the investigation of his alleged drug possession was racially motivated. A-9 to A-10. Appellants would have offered evidence that a white firefighter was accused of using drugs and was not personally investigated by senior fire department officials or the police, unlike Smith. The trial court incorrectly excluded the evidence on the grounds of hearsay. However, Appellants were not offering the evidence of the white firefighter's drug use to prove that the white firefighter actually used drugs; rather, Appellants offered the evidence to prove the disparate treatment of the white firefighter and Smith. Contrary to the trial court's conclusion that Appellants lacked witnesses with knowledge as to the accusation made of the white firefighter, Appellants were prepared to present witnesses accordingly. Moreover, the Eighth Circuit Court of Appeals affirmed the trial court by ruling that the trial court has not abused its discretion in excluding the witnesses who would have testified to the racial hostility.

E. Exclusion of Testimony of Debra Giles Smith

Proving that they had been damaged by the acts of the City was an additional element that the Appellants were required to prove. In support of his damages claim, Appellant Smith offered testimony from his wife, Debra Giles Smith, concerning the effect that working at Defendant City had on their marriage, including playing

a significant role in causing their subsequent divorce. The trial court excluded this evidence as irrelevant and in fact took judicial notice that it was not competent evidence

> I'm going to take some judicial notice, some common sense in this world. I'm going to tell you that the incidents as related simply do not cause people to rise to the extent of a divorce. It just simply is not there. And it's true that the witness has testified to that.
>
> I'm going to stop you at this point. We're not going to go any farther with it, but I'm not – also not going to try a domestic relations case.

Moreover, the Eighth Circuit Court of Appeals affirmed the trial court by ruling that the trial court has not abused its discretion in excluding the testimony of Ms. Smith.

All of the above evidence, established a racial animus linked to the harassment, harassment and/or discrimination of a severe or pervasive nature, of which the City knew or should have known, and yet failed to take prompt remedial action. See White v. Honeywell, Inc., 141 F.3d 1270, 1272-73 (8th Cir. 1998). As a result of the trial court's rulings, however, Appellants were essentially required to try their case with one hand tied behind their back-unable to use evidence that would have aided in either establishing the prima facie elements of their case or creating an inference of racial animus. This was clearly an abuse of discretion and thus this case should be remanded for a new trial.

CONCLUSION

Therefore, this Court must grant certiorari of this matter to clarify the important area of federal involving hostile work environments described herein.

Dated: October 21, 2003

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Robert Mems, Nathanial Khaliq, Philip Webb, Thurman Smith, and Byron Brown,

Civ. File No. 97-1589 (PAM/JGL)

Plaintiffs,

v.

MEMORANDUM AND ORDER

The City of St. Paul-Department of Fire and Safety Services,

Defendant.

James Logan,

Civ. File No. 01-1378 (PAM/JGL)

Plaintiff,

The City of St. Paul-Department of Fire and Safety Services,

Defendant.

This matter is before the Court on Plaintiffs' Motion for the Court to allow a site visit to St. Paul Fire Department Station 20 and nine Motions in Limine filed by Defendant.

BACKGROUND

Following summary judgment and a subsequent appeal, this case has distilled to one claim: Plaintiffs,

African American firefighters, were subject to acts of racially discriminatory harassment sufficient to create a hostile work environment, and Defendant St. Paul Fire Department ("SPFD") failed to take prompt and effective remedial action after. Plaintiffs complained of this harassment.

The case has its origins in 1992 when Plaintiffs Robert Mems, Nathanial Khaliq, Thurman Smith, and Byron Brown sued SPFD for racial discrimination. The parties settled this suit two years latter. As part of this settlement, SPFD was released from all claims that these Plaintiffs might have had against SPFD which arose before June 17, 1994. In 1996, however, the same four Plaintiffs, joined by Philip Webb and James Logan, brought another action against SPFD for racial discrimination. Specifically, Plaintiffs alleged both disparate treatment and disparate impact.

SPFD moved for summary judgment on both claims. Judge Richard H. Kyle granted the motion, concluding that: (1) the Plaintiffs failed to allege conduct sufficiently severe and pervasive to create a hostile work environment; and (2) Plaintiffs failed to present sufficient statistically relevant evidence of disparate impact. See Mems v. City of St. Paul-Dept of Fire and Safety Servs., 73 F. Su . 2d 1031, 1044 (D. Minn. 1999) (Mems I). Plaintiffs appealed. The Eighth Circuit reversed on the disparate treatment claim but affirmed on the disparate impact claim. See Mems v. City of St. Paul-Dept. of Fire and Safe, Servs., 224 F.3d 735, 741 (8th Cir. 2000)) (Mems II). On remand, the case was assigned to this Court and is now scheduled for trial on November 19, 2001.

DISCUSSION

A. Plaintiffs' Motion for the Court to Allow a Site Visit

Plaintiffs request that the Court allow the jury to visit St. Paul Fire Station 20. Plaintiffs claim that such a visit will help the Court and jury understand the physical configuration of the facility, the equipment necessary for the Plaintiffs to perform their jobs, and the close quarters in which the Plaintiffs and their co-workers function.

Because such a visit would be time-consuming and disruptive of the ordinary course of the trial, the Court will balance the importance of the information that would be gained from such a visit against the extent to which such information can be secured from photographs, diagrams, or other evidence. in this case, although the physical configuration of the facility, and in particular the close quarters of the work environment, is relevant to the case, information about this configuration can be adequately presented to the jury through photographs, video recordings, or diagrams as well as through testimonial evidence. Accordingly, the importance of a site visit is minimal. The Court therefore denies Plaintiffs' request.

B. Defendants' Motion to Exclude Evidence Relating to Damages for Alleged Disparate Treatment in Discipline or Promotional Practices

Defendant contends that Plaintiffs cannot present evidence that they suffered discriminatory discipline because they failed to address this claim in their memorandum opposing summary judgment. Judge Kyle, accordingly, concluded that Plaintiffs had abandoned this claim. See Mems T, 73 F. Supp. 2d at

1032 n.1. Similarly, Defendant argues that Plaintiffs cannot contend that they were harmed by disparate promotional practices because the only claim remanded for trial by the Eighth Circuit was the Plaintiffs' hostile work environment claim. See Mems II, 224 F.3d at 741.

Plaintiffs respond by arguing that a disparate treatment claim is not limited to economic or tangible discrimination, but extends to the entire spectrum of disparate treatment, which includes requiring people to work in. discriminatorily hostile or abusive environments. The Court agrees. The touchstone for a hostile work environment claim is whether "the workplace is permeated with `discriminatory intimidation, ridicule and insult' that is `sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Dowd v. United Steelworkers of Am., Local No. 286, 253 F.3d 1093,1101-02 (8th Cir. 2001) (quoting Quick v. Donaldson Co., 90 F.3 d 1372, 1378 (8th Cir.1996) (quoting Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993))). Evidence related to Defendant's alleged discriminatory disciplinary practices is relevant to Plaintiffs' disparate treatment claim insofar as those practices tend to show that the workplace was permeated with discriminatory animus sufficient to alter the conditions of Plaintiffs' employment.

The Court declines, however, to revivify Plaintiffs' claim that the Defendant's promotional practices had a disparate impact on them. That claim was dismissed during the summary judgment phase of this litigation. Plaintiffs' shrewdly attempt to render evidence about the alleged discriminatory promotional practices of Defendant admissible by characterizing it as evidence that Plaintiffs chase not to take the promotional exam because of the hostile work environment. This sleight sleight of hand, however, is not sufficient to render such evidence admissible.

Accordingly, the Court grants Defendant's motion in part and denies it in part. Specifically, Plaintiffs may present evidence relating to the alleged discriminatory disciplinary practices of Defendant. Plaintiffs may not, however, introduce evidence relating to alleged disparate treatment resulting from Defendant's promotional practices.

C. Defendant's Motion to Exclude a Claim for Constructive Discharge

Defendant argues that Plaintiffs are trying to amend their pleadings by alleging that a hostile working environment was a substantial contributing factor to several of the Plaintiffs' decision to retire. Defendant contends that (1) this claim should be barred because it was not properly pled; (2) this claim. should be barred because Defendant was not given an adequate chance to move for summary judgment on it; and (the claim would be "new to the law."

Four of the Plaintiffs were deposed by Defendant's counsel regarding this claim. Accordingly, Plaintiffs argue the claim is not "new" in a prejudicial sense.

The Court grants Defendant's Motion. Although evidence that the Plaintiffs' decision to retire was based in substantial part on a hostile working environment may be probative of the fact that Plaintiffs subjectively felt that the workplace was hostile, see Callanan v. Runyun, 903 F.Supp. 1285, 1297 (D. Minn. 1994) (recognizing that a hostile work environment claim has "both an objective and a subjective component"), the Court agrees that Plaintiffs have not properly pled a constructive discharge claim. Because Plaintiffs can establish the requisite subjective component of a hostile work environment claim through a myriad of other

evidence, it is unnecessary and would be cumulative for the Plaintiffs to introduce evidence that they retired because of a hostile work environment. Not only is this evidence unnecessary and cumulative, but its probative value is outweighed by the potential that its introduction would. confuse or mislead the jury. See Fed. R. Evid. 403.

D. Defendant's Motion to Exclude the Expert Testimony of John Taborn

Defendant contends that the Plaintiffs' expert witness, Dr. John Taborn, should not be allowed to testify at trial. Plaintiffs wish to have Dr. Taborn testify that although none of the Plaintiffs suffered from clinically diagnosable distress arising from discrimination, they each face "psychological predicaments" which take a "heavy psychological toll." Defendant essentially argues that: (1) Dr. Taborn's testimony misapplies the "psychological predicament" concept; (2) this misapplication is unscientific and unreliable; and (3) Dr. Taborn's testimony will not assist the jury.

The Court has the obligation to act as a "gatekeeper," screening proffered expert evidence to ensure that what is admitted "is not only relevant but reliable." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). To determine whether proffered expert evidence satisfies the standard of reliability, the Court must ascertain whether such evidence is "ground[ed] in the methods and procedures of science." Id, at 590. In this case, that determination is impossible to make on the basis of the information provided by the parties for this Motion. Accordingly, the Court will rule the admissibility of Dr. Taborn's testimony at a Daubert hearing. Until the Court determines whether Dr. Taborn's testimony is admissible, the parties are

ordered to avoid mention of Dr. Taborn's testimony during the trial.

E. Defendant's Motion to Exclude Evidence of Alleged Violations that Occurred Outside the Statute of Limitations

Defendant contends that Plaintiffs should only be allowed to present evidence relating to alleged incidents of discrimination which occurred within 300 days of the fling of Plaintiffs' claims. Plaintiffs respond by arguing that the continuing violations doctrine, which. renders a claim timely if it is based on an ongoing violation that began. before the limitations period but continued into it, applies in this case. See Kline v. City of Kansas City Fire Dep't, 175 F.3d 660, 664-65 (8th Cir.1999). Defendant asserts that the continuing violations doctrine is inapposite in. this case because Plaintiffs allege only isolated instances of discrimination rather than a pattern or practice of discrimination. Even if the doctrine applies, however, Defendant argues that the probative value of this evidence is outweighed by the danger that it would be prejudicial.

Defendant may be right when it claims that the continuing violations doctrine does not apply in this case; however, "[e]ven if a plaintiff is unable to show a continuing violation, . . . instances of harassment occurring outside the [limitations] period may be admissible to provide relevant background to later discriminatory acts." Id. at 665 (quoting Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 761 (8th Cir. 1998). The Court is not persuaded that the probative value of such evidence is outweighed by its potentially prejudicial effect. Any possibility of prejudice can be adequately avoided during trial with appropriate prophylactic instructions. Accordingly, the Court denies Defendant's Motion without prejudice. Defendant is free to argue at a later stage of this proceeding that the continuing

violations doctrine should not operate in this case to delay the statute of limitations.

F. Defendant's Motion to Exclude Certain Witnesses

Defendant has fled this blanket motion which. really amounts to a claim that Plaintiffs failed properly to disclose certain witnesses. Defendant contends that ten of the twenty-five friends and family members of Plaintiffs listed as being potential witnesses were not properly disclosed. Additionally, Defendant argues that if these witnesses are being called simply to testify about damages, five witnesses per Plaintiff is cumulative and burdensome. Finally, Defendant claims that five African-American firefighters who have been listed as potential witnesses because they have knowledge of the racially hostile work environment were not properly disclosed.

Plaintiffs respond by arguing that these witnesses were properly disclosed and by arguing that Defendant has not properly disclosed a number of its witnesses.

The Court does not endorse either side's failure to properly identify witnesses for trial. However, any improper disclosures in this case do not appear to have created any prejudice. The Court agrees with Defendant, however, that five damages witnesses per Plaintiff is unnecessarily cumulative and burdensome. Accordingly, each plaintiff is limited to calling two damages witnesses.

G. Defendant's Motion to Exclude a Photograph of Captain Michael Ness

Plaintiffs want to introduce into evidence a photograph that was posted in Station 20 showing

Captain Michael Ness and another firefighter extending their middle fingers to the camera. Defendant seeks to have the Court prohibit Plaintiffs from testifying that they felt that this picture communicated "fuck you, nigger." Because it is undisputed that no racial slurs occurred at Station 20 after the 1994 settlement, Defendant contends that allowing Plaintiffs to testify that this is what the picture said to them would allow Plaintiffs to improperly inject perhaps the most explosive of all racial epithets into evidence.

Plaintiffs contend they must show that the work environment was both objectively and subjectively hostile or abusive and that Plaintiffs' perceptions are valid and highly relevant. Although Plaintiffs are correct in stating that their perceptions are relevant, given the inflammatory racial invective at issue, the Court agrees with Defendant. The photograph's probative value is outweighed by its potential for substantial and unfair prejudice. Accordingly, Plaintiffs may not introduce the photograph into evidence.

H. Defendant's Motion to Exclude Allegations Regarding Dino Guerin

In 1996, Plaintiff Thurman Smith was accused of drug possession. In an effort to establish that this accusation was unfounded and discriminatory, Plaintiffs want to introduce evidence of allegations of drug use by a white firefighter, Dino Guerin. Defendant claims that this evidence is hearsay. Plaintiffs respond by arguing that they do not want to introduce statements that Dino Guerin allegedly possessed drugs to prove the truth of these allegations. Rather, they claim that they want to introduce this evidence to show how Defendant handled, investigated, and responded to an accusation of drug abuse against a similarly situated Caucasian firefighter.

The Court is unpersuaded by Plaintiffs' argument. Although they may not be offering evidence that Dino Guerin allegedly used drugs to prove that Guerin actually did use drugs, they are offering such evidence to prove that Guerin was accused of possessing or using drugs. Because Plaintiffs have not identified any witnesses with personal knowledge who arc competent to testify that Guerin was accused of possessing drugs, the Court grants Defendant's Motion.

I. Defendant's Motion to Exclude Allegation Regarding Ran Buziky's Reaction to Gunshot

Plaintiff. Robert Mems was shot and injured in 1998. Apparently, Mems was later told that firefighter Tom Buzick said that Mems should have died. Plaintiffs want to introduce this evidence in support of their contention that the workplace was hostile and racially char ed. Defendant claims that there is no evidence that this comment was racially motivated and that Mems even admitted this in his deposition. Given the highly inflammatory nature of the comment, Defendant argues that its potential relevance is outweighed by its prejudicial effect. The Court agrees. Accordingly, Defendant's Motion is granted.

J. Defendant's Motion to Exclude Testimony Regarding Conflict Between Captains Over Window Washing Schedule

Plaintiffs want to introduce evidence relating to an incident that occurred between B-Shift Captain John Dubois and A-Shift Captain Mike Ness. Apparently, Ness called Dubois a "fucking idiot." Both Captains are white. Accordingly, Defendant argues that this incident shows at most a personality conflict and has no relevance to the discriminatory working environment

that Plaintiffs `claim existed. Plaintiffs argue that the tensions between the shifts was racially based and accordingly contend that Ness's fulmination is directly related to this racial hostility.

The Court agrees with Defendant that evidence relating to this incident is not sufficiently connected to the racial tensions alleged in this case to warrant its admissibility. It is likely that such evidence would be misleading or confusing. See Fed. R. Evid. 403. Accordingly, Defendant's Motion is granted.

CONCLUSION

For the foregoing reasons, and upon all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion for the Court to Allow a Site Visit (Clerk Doc. No. 102) is **DENIED;**

2. Defendant's Motions in Limine (Clerk Doc. No. 99) are **GRANTED in** part and **DENIED in part** as follows:

   a. Defendant's Motion to Exclude Evidence Relating to Damages for Alleged Disparate Treatment in. Discipline or Promotional Practices is GRANTED IN PART and DENIED IN PART as set forth above;

   b. Defendant's Motion to Exclude a Claim for Constructive Discharge is GRANTED;

   c. Defendant's Motion to Exclude the Expert

Testimony of. John. Taborn will be ruled on after a Daubert hearing;

d. Defendant's Motion to Exclude Evidence of Alleged Violations that Occurred Outside the Statute of Limitations is DENIED without :prejudice;

e. Defendant's Motion to Exclude Certain Witnesses is GRANTED IN PART and DENIED IN PART as set forth above;

f. Defendant's Motion to Exclude a Photograph of Captain Michael Ness "Flipping the Bird" is GRANTED;

g. Defendant's Motion to Exclude Allegations Regarding Dino. Guerin is GRANTED; h. Defendant's Motion to Exclude Allegation Regarding Ron Buziky's Reaction to Gunshot is GRANTED; and

i. Defendant's Motion to Exclude Testimony Regarding Conflict Between Captains Over window washing Schedule is GRANTED.

Dated: November 12, 2001

s/
Paul A. Magnuson
United States District Court Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Robert Mems. Nathanial Khaliq, Philip Webb, Thurman Smith, and Byron Brown;

Civ. File No. 97-1589 (PAM/JGL)

Plaintiffs,

v.

CORRECTED ORDER FOR JUDGMENT

The City of St. Paul-Department of Fire and Safety Services,

Defendant.

(X) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

( ) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Plaintiff Phillip Webb and against Defendant in the amount of S 1.00. Plaintiff Phillip Webb is to recover from Defendant his costs of. action. Judgment is entered in favor of Defendant and against Plaintiffs Robert Mems, Nathaniel Khaliq, Thurman Smith, and Byron Brown. Defendant

may recover from Plaintiffs Mems, Khaliq, Smith, and Brown its costs.

Dated: February 15, 2002

RICHARD D. SLETTEN, CLERK

s/
Paul A. Magnuson
United States District Court Judge

s/
Mary Kaye Conery, Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Robert Mems, Nathanial Khaliq Phillip Webb, Thurman Smith, and Byron Brown,

Civ. File No, 97-15 89 (PAM/JGL)

Plaintiffs,

v.

MEMORANDUM AND ORDER

The City of St. Paul-Department of Fire and Safety Services,

Defendant.

This matter is before the Court on Plaintiffs' Motion for New Trial.[1] After a review of the record and consideration of Plaintiffs' arguments, the Court denies the Motion.

DISCUSSION

The Court may grant a new trial if, because of an unsupported verdict, an excessive damage award, or significant legal errors at trial, a "miscarriage of justice" has occurred. Gray v. Bicknell, 86 F.3d 1472, 1480 (8th Cir.1996); Hannah v. Haskins, 612 F.2d 373, 376 (8th Cir. 1980) (stating that a new trial is appropriate if "prejudicial error has been committed in the trial of the action").

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[1] Although Plaintiffs hale not filed a Motion but only a Memorandum in support of the Motion for a New Trial, the Court will consider the merits of Plaintiffs' arguments.

Plaintiffs argue that a new trial is warranted because of six alleged errors of. law made by the Court during the trial. These errors include the exclusion of Plaintiffs' expert Witness testimony, the exclusion of certain evidence, the exclusion of Plaintiffs' claims of failure to promote and early retirement, the Court's limitation of damages to the statute of limitations period, and alleged errors in the jury instructions. Finally, Plaintiffs argue that the jury's verdict was against the great weight of the evidence. None of the grounds cited by Plaintiffs, either individually or taken together, rises to the level of prejudicial error that would mandate anew trial. Because the jury in this case deliberated with care and the verdicts were supported by the evidence in the case, the Court will not set the jury's verdicts aside.

A. Exclusion of Expert Testimony

Plaintiffs complain that the Court "unfairly denied ... their substantial rights to ultimately prove their case"" (Pls.' Mem. at 4) by excluding the expert testimony of Dr. John Taborn. In particular, Plaintiffs contend that the Court erred by concluding that they submitted untimely information that amounted to a supplementation of Dr. Taborn's expert report, that, in any event, excluding Dr. Taborn's testimony was an inappropriate and extreme remedy, and that the Court erred in reconsidering and reversing its earlier Daubert ruling.

It is worth noting at the outset that the exclusion of Dr. Taborn, a damages witness, could have had an adverse effect only on Plaintiff Phillip Webb because the jury did not reach the damages question for any of the other Plaintiffs. Having made that note, the Court will not revisit at length its determination that Plaintiffs supplemented their expert's report in an untimely

manner. Suffice it to say that the Federal Rules of Civil Procedure make it absolutely clear that a testifying expert's report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefore [and] the data or other information considered by the `fitness in forming the opinions . . ." Fed. R. Civ. P. 26(a)(2)(B) (emphasis added). There is no question that Dr. Taborn re-interviewed each Plaintiff and took new notes of those interviews after the initial disclosure required by the Rules. These notes were not provided to Defense counsel until after business hours on the night before Dr. Taborn was to testify. Pursuant to Fed. R. Civ. P. 26(e)(1), this additional or changed information was due prior to the trial, at the very latest..

Despite Plaintiffs' petulance at the remedy imposed by the Court, as Defendant correctly points out, district courts need not impose the least onerous sanction available. Chrysler Corp. v. Carey, 186 F.3 d 1016,1022 (8th Cir.1999). Under the circumstances of. this case, the Court determined that granting a continuance or rescheduling the testimony of Dr. Taborn was insufficient to remedy Plaintiffs' egregious abuse of the judicial process.

Finally, it was not an error for the Court to reconsider and reverse its earlier Daubert ruling in this case. Plaintiffs had represented during the Daubert hearing that Dr. Taborn's testimony was necessary because the Plaintiffs themselves could not express their complaints of emotional distress due to their denial and repression. During the course of the trial, however, each Plaintiff took the stand and testified at length about his emotional complaints. In light of Plaintiffs' misrepresentation during the Daubert hearing, the Court was moved to reconsider and reverse its earlier decision.

B. Exclusion of Evidence

Plaintiffs contend that the Court erred by excluding no loss than six categories of evidence that they claim was necessary to prove their prima facie case. As an initial matter, the Court agrees with Defendant that not all of these rulings have the same potential effect on all of the Plaintiffs. These rulings have no effect on Plaintiff Webb because the jury determined that he had proven his prima facie case. Additionally, to the extent that the rulings relate to the B-shift, these rulings have no bearing on Plaintiff Smith's case.

Because Plaintiffs have raised no new considerations, the Court will not review each of its rulings in detail. Most of Plaintiffs' complaints about the evidentiary rulings of the Court distill to the claim that "the court's crabbed notions . . . unfairly prevented the Plaintiffs from proving their case." (Pls.' Mem. at 13.) Plaintiffs, however, must do more than merely claim that the Court erred in its rulings. Beyond establishing that the Court erred, Plaintiffs must also demonstrate that these alleged errors were "so prejudicial that a new trial would likely produce a different result." Bevan v. Honeywell, Inc., 118 F.3d 603, 612 (8th Cir.1997). Not only have Plaintiffs failed to show that the Court's rulings were erroneous, but they have failed to show that any alleged errors were so prejudicial as to alter the outcome of the case.

C. Exclusion of Failure to Promote and Early Retirement Claims

Plaintiffs contend that they should have been allowed to present evidence that the allegedly hostile work environment "took away their ability to take the promotional exams." (Pls. Mem. at 18.) Plaintiffs,

however, were not prevented from taking promotional exams. Plaintiffs chose not to take such exams allegedly because of the hostile work environment. As the Court determined when ruling on the motions in limine, such a choice was only relevant to show that Plaintiffs subjectively felt that the work environment was hostile. Because Plaintiffs were able to, and ultimately did, adduce other evidence of the subjectively hostile nature of the work environment, evidence relating to their choice not to take promotional exams was cumulative and its probative value was outweighed by its potential to confuse or mislead the jury.

In a rather perplexing argument, Plaintiffs also contend that a new trial is ,justified because the Court should have allowed them to amend their Complaint to include a claim of constructive discharge. Plaintiffs. however, never made such. a request. Accordingly, a new trial is not warranted to allow Plaintiffs such an opportunity.

D. Statute of Limitations

Plaintiffs' next argument is that the Court incorrectly narrowed the period of recovery for illegal acts of discrimination under the Minnesota Human Rights Act ("MHRA"), Minn. Stat. 363.01 et seq., to the one-year statute of limitations period. Once again, it is important to note that because the jury only reached the question of damages for Plaintiff Webb, this alleged error could have affected only him.

Plaintiffs claim that the law in Minnesota does not limit the damages for employment discrimination plaintiffs to only the acts that occurred within the statute of limitations period. Plaintiffs cite no Minnesota case law that supports their position, however. Instead, Plaintiffs merely argue that the Court's ruling

'.'abrogates the continuing violation doctrine with nonsensical results." (Pls.' Mem. at 20.)

Significantly, Plaintiffs do not challenge the Court's ruling with regard to their claims under Title VII of the Civil Rights Act of 1964 ("Title VII'), 42 U.S.C. § 2000e et seq. Plaintiffs' contention that limiting recovery for illegal acts of discrimination to the statute of limitations period is "nonsensical" would seem to apply equally to claims under Title VII. Such a contention, however, would flout the firmly ensconced law of this Circuit. The Court of Appeals has continually justified the rule that "plaintiffs may only recover damages on their [Title VII] discrimination claims for acts committed during [the] statute of limitations period, even. if there was a continuing violation." Madison v. IBP, Inc., 257 F.3d 780,796-97 (8th Cir. 2001) (citing Kline v. Kansas City Fire Dep't, 175 F.3d 660, 665 (8th Cir.1999) ("Damages, however, may be recovered only with respect to events that occurred within the limitations period.")). This rule "strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past." IBP, Inc., 257 F.3d at 797 (quoting Ashley , 66 F.3d at I67-68). It is therefore disingenuous to say that applying this rule to the MHRA, when there is no controlling Minnesota case law to the contrary, is "nonsensical." Accordingly, the Court did not err in limiting the extent of Plaintiffs' recovery to the MHRA statute of limitations period.

E. Jury Instructions

Finally, Plaintiffs contend that the Court erred in instructing the jury. Specifically, Plaintiffs argue that Instruction 12 was misleading and confusing because it provided that "Defendant City of St. Paul . . . claims that Plaintiffs unreasonably failed to take advantage of

corrective opportunities. "According to Plaintiffs, Defendant offered no evidence that Plaintiffs failed to take advantage of any corrective opportunities.

As Defendant notes, however, proof that an employer promulgated an antiharassment policy with complaint procedures and proof that an employee failed to use the complaint procedures may constitute a defense. See Burlington Indus.. Inc, v. Ellerth., 524 U.S. 742, 765 (1998). In this case, Defendant did provide such proof. Accordingly, Instruction 12 was a fair and accurate statement of the law.

Plaintiffs also argue that the language in Instructions 16, 18, and 22 was erroneous. Plaintiffs argument overlooks the fact that the language used in these instructions is based on the law of this Circuit. The definition of the teen "unwelcome" in instruction 16 is taken from Moylan v. Maries County 792 F.2d 746, 749 (8th Cir. 1986). The factors to be considered in determining whether a reasonable person in each Plaintiffs circumstances would find his or her work environment hostile or abusive and the descriptions of what constitutes a hostile work environment are likewise grounded in the case law of this Circuit. See Cater v. Chrysler Corp., 173 F.3d 693, 702 (8th Cir.1999); Hathaway v. Renyen. 132 F.3d 1.214, 1221 (8th Cir.1997). Finally, as Defendant notes, Instruction 22 was a correct statement of the law. See Madison, 257 F.3d at 797. Taken as a whole, these instructions concisely and accurately set forth the essential elements of Plaintiff's' claims.

CONCLUSION

Plaintiffs have failed to demonstrate that a new trial is warranted. Accordingly, based on the files, record, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff's Motion for a New Trial (Clerk Doe. No. 155 is **DENIED.**

Dated: February 20, 2002

s/
Paul A. Magnuson
United States District Court Judge

United States Court of Appeals,
Eighth Circuit.
Robert MEMS; Nathanial Khaliq; Phillip Webb;
Thurman Smith; Byron Brown,
Appellants,
v.
CITY OF ST. PAUL, DEPARTMENT OF FIRE
AND SAFETY SERVICES, Appellee.

No. 42-1834.

Submitted: Dec. 13, 2002.
Filed: April 30, 2003.
Rehearing and Rehearing En Banc
Denied July 23, 2003.

Five African-American firefighters sued city employer, alleging race discrimination and hostile work environment, in violation of Title VII and the Minnesota Human Rights Act (MHRA). The United States District Court for the District of Minnesota, Paul A. Magnuson, J., 2002 WL 334411, entered judgment, upon jury verdict in favor of city, with respect to claims of four firefighters, and entered judgment, upon jury verdict, awarding damages in the amount of one dollar in favor of one firefighter. All firefighters appealed. The Court of Appeals, Magill, Circuit Judge, held that: (1) exclusion of testimony of expert damages witness hired by African-American firefighters was warranted as sanction for firefighters' discovery violation; (2) any error in excluding evidence was not prejudicial; (3) submission of jury instruction stating that city claimed that African-American firefighters unreasonably failed to take advantage of corrective opportunities was warranted; (4) hostile work environment jury instruction was not improper comment on evidence; (5) damages jury instruction was not misleading; and (6)

discrete acts of racial discrimination were not part of continuing violation.
Affirmed.

Heaney, Circuit Judge, filed dissenting opinion.

The Court of Appeals reviews the denial of a motion for a new trial for abuse of discretion.
*774 Jeffrey R. Anderson, argued, St. Paul, MN (Frances E. Baillon and Patrick W. Noaker, on the brief), for appellants.

Peter G. Mikhail, argued, Assistant City Attorney, St. Paul, MN, for appellee.

Before WOLLMAN, HEANEY, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

FOR RELATED JURY VERDICT SUMMARIES SEE:

2002 WL 32158711

African-American firefighters Robert Mems, Nathanial Khaliq, Phillip Webb, Thurman Smith, and Byron Brown (collectively "Appellants") sued their employer, the City of St. Paul, Department of Fire and Safety Services ("City" or "SPFD"), under the Minnesota Human Rights Act ("MHRA"), Minn.Stat. § 363.03 (2000), and Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e--2000e-17 (2000), alleging that they had been subjected to illegal race harassment and had experienced a hostile work environment. Appellants Mems, Khaliq, Smith, and *775 Brown appeal from the final judgment entered on the jury verdict in favor of the City. Appellant Webb appeals from the final judgment entered on the jury

verdict awarding him $1 in damages. Appellants also appeal the district court's [FN 1] subsequent denial of their new trial motion. For the following reasons, we affirm.

FN 1. The Honorable Paul A. Magnuson, United States District Judge for the District of Minnesota.

I.

A. Background

SPFD is organized into three shifts at each fire station, known as the A, B, and C shifts. Each shift is on duty for twenty-four hours at a time, and the firefighters live, eat, and work at their station while on duty. The shifts rotate so that the B shift relieves the A shift half of the time and relieves the C shift the other half of the time. The firefighters bid for the shift and station they work at through a seniority-based system.

In 1992, eleven African-American firefighters brought a lawsuit against the City, alleging discrimination and harassment between 1975 and 1991. Appellants Mems, Khaliq, Smith, and Brown were parties to the suit. The case settled in June 1994. As part of the settlement, the first minority to sit on the administration, Anthony Carter, an African American, was chosen to serve in the newly created Assistant Chief position. In addition, the settlement released the City from all claims that these Appellants might have had against the City arising before June 17, 1994.

When the settlement was announced, Appellants Mems, Brown, Webb, and Khaliq worked at St. Paul Fire Station 20 on the B shift. At this time, six African-American men and two Caucasian men made up the B shift. The A shift consisted of all Caucasian men.

Appellant Smith worked the C shift at station 20, but occasionally filled in for other firefighters on the B shift.

B. Alleged Racial Harassment

1. Appellant Smith

In August 1994, Smith was filling in for an A-shift firefighter, when a Caucasian A-shift firefighter reported the smell of alcohol on Smith's breath.

Captain Rodney Bergstrom and District Chief Dick Wiesner asked Smith about the allegation. Smith offered to let them smell his breath and satisfied their concerns.

In the fall of 1996, an African-American B-shift firefighter told B-shift Captain Ross that he saw what appeared to be crack cocaine fall from Smith's locker. Ross reported the information to Assistant Chief Carter. Carter called the St. Paul Police. Department, and the police came to the station, where they confronted and questioned Smith. Smith consented to a search of his person and locker, which yielded no drugs.

2. A shift versus B shift in station 20

Appellants testified that, shortly after the 1994 settlement, the A shift started harassing the B shift.

Appellants testified that the A shift sabotaged the fire station several times by hiding cooking utensils, leaving the windows open in the winter time, and turning the heat up excessively before the B shift came on duty. In addition, A-shift Captain Rodney Bergstrom would often conduct a white-glove inspection of the fire department when the B shift was coming off duty and the A shift was coming on *776 duty. B-shift Captain John Dubois testified that these housekeeping issues

were common disputes among shifts. These housekeeping complaints were never contemporaneously reported to Captain Dubois, and he never saw the windows open or the thermostat up.

In January 1995, members of the A shift complained that members of the B shift were staying at the station after the B shift ended. In response, the B shift was directed to be out of the station by 8:00 a.m., the time of the shift change. This was the first order of this kind at station 20. Mems and Khaliq subsequently filed a race discrimination claim concerning this order. Assistant Chief Carter rescinded the order and investigated the matter.

In February 1995, an email was sent by a Caucasian A-shift firefighter, Mark Montanari, regarding the 1994 settlement: "I feel that I can fully acept [sic] the healing process much easier for [redaction]. That would help me greatly to be able to work together in a more relaxed mode." [FN2] Trial Ex. No. 112. Appellants complained about the email, but Montanari was never disciplined.

> FN2. Pursuant to an agreement by the parties, the amount of money paid in the settlement was redacted from this exhibit.

Also in February 1995, a meeting was held between the A- and B-shift members. During this meeting, at least one firefighter admitted that there were racial tensions in the station.

In May of 1995, offensive photographs were posted at station 20 on the bulletin board. Captain Ness was given an oral reprimand for this posting.

In the months following Captain Ness's reprimand, Mems' fire gear, fire rig, and equipment were damaged.

Captain Ross and Assistant Chief Carter concluded that the problems with the equipment were likely accidental, and the City investigation concluded that Mems' gear experienced normal wear and tear.

Until May 1995, for a period of at least seven years, Pat McCardle, a Caucasian A-shift firefighter, relieved Webb immediately upon McCardle's arrival at station 20, even if it was before the 8:00 a.m. shift change. On May 16, 1995, without any word to Webb, McCardle did not take a run for Webb that came in before 8:00 a.m. Again, on July 1, 1995, McCardle did not relieve Webb when an alarm came in at 7:48 a.m. When Webb came back from the July run, he confronted McCardle regarding these instances, and an argument ensued. After this confrontation, McCardle complained that he felt threatened by Webb. On November 14, 1995, following an investigation, Webb received a verbal reprimand for violation of the SPFD's policy of respect. On July 3, 1995, McCardle took a run for Webb before 8:00 a.m., and McCardle continued to take runs for Webb until McCardle retired in December 1998.

On December 4, 1995, Webb filed a race harassment claim with the St. Paul City Department of Human Rights ("DHR"), alleging that McCardle's failure to take the above-mentioned runs was motivated by racial hostility. B-shift Captain Dubois, a Caucasian, helped Webb to file the complaint.

In February 1996, Captain Dubois filed his own complaint against Harold Strassner, a Caucasian A-shift firefighter, claiming racial hostility. After Strassner learned that he was mentioned in Webb's complaint, Strassner threatened to sue Dubois. At trial and in his complaint, Dubois explained that he was treated poorly by A-*777 shift personnel because he stood up for his B-shift personnel.

In the spring of 1996, B-shift firefighters coming on duty after the A shift found cartoons and articles from the Conservative Chronicle, which Appellants testified they considered racist. Appellants complained to their supervisors about the cartoons. No offensive cartoons appeared in the station again after the complaint.

In early May 1996, DHR finished its investigation of Webb's claim regarding McCardle and forwarded its finding to Chief Fuller. The DHR suggested, in its cover letter, that the City should ensure compliance with anti-discrimination laws because some of the interviewees expressed concerns about a "hostile work environment." Trial Ex. No. 317. DHR found that there was probable cause to believe that McCardle's actions toward Webb were retaliatory for the 1994 settlement and for Captain Ness's reprimand for posting the offensive pictures. In addition, DHR found probable cause to believe that McCardle violated workplace conduct policy by not informing Webb that he no longer would be taking the runs.

On May 20, 1996, Webb called Assistant Chief Carter, asked if the DHR report was complete, and requested a copy. Carter told Webb that in a few days Carter would have something in writing for Webb regarding the report.

On May 21, 1996, Assistant Chief Carter drafted a letter of reprimand for McCardle, but did not send it. Instead, Carter decided to investigate the claim further because he could not find a standard operating procedure that McCardle had violated.

On May 22, 1996, Assistant Chief Carter had two conversations with Webb. First, Carter called Webb to inform Webb that he was still working on putting

something in writing regarding the investigation results. At the time of the call, Webb was on duty at station 20. The conversation became hostile. Assistant Chief Carter then ordered Webb to come down to headquarters where their second conversation took place. This conversation was heated as well. Web returned to station 20 and took the rest of the day off sick. A few days later, Webb was sent for a fitness-for-duty exam.

Shortly thereafter, Carter forwarded the DHR report to the Affirmative Action Director and the City Attorneys' Office. Neither found supporting evidence for the DHR's conclusions that McCardle's actions were retaliatory or that he violated any workplace policy. On June 10, 1996, Carter sent a letter to McCardle indicating that McCardle's actions were not racially motivated and there was not enough evidence to support disciplinary action.

During the summer of 1996, a basketball hoop primarily used by B-shift firefighters was vandalized at least three times. Also during the summer of 1996, Anna Maravelas, a conflict specialist with no training in race relations, was hired to address problems at station 20.

In October 1996, Mems, as President of the Black Firefighters United Organization, sent a letter to the NAACP, requesting that the NAACP, on behalf of African-American firefighters including the Appellants, conduct an independent investigation regarding the concerns with racial hostility because the City was not resolving the problem. On November 15, 1996, a race harassment claim was filed with the Equal Employment Opportunity Commission ("EEOC"), on behalf of the African-American firefighters.

In November 1996, Khaliq met with Chief Fuller. Khaliq gave Chief Fuller a summary of events Khaliq considered racially *778 hostile and harassing. Chief Fuller took no action in response to this meeting.

In December 1996, Khaliq found two of his magazines destroyed at station 20: *American Legacy* and *Al Jumuah*. *Al Jumuah* was in the trash and covered with grease. The cover of *American Legacy*, which depicted national guardsmen and African-American children, was ripped in half, with the half of the national guardsmen ripped into small pieces. Khaliq filed a racial harassment complaint with Assistant Chief Carter. Assistant Chief Carter personally interviewed everyone on the A shift and had the police test the magazines for fingerprints. No culprit was found.

Khaliq testified that at some point in 1996 he found his car damaged in the station 20 parking lot: it was scratched and his fender was bent. In addition, Webb testified that some time in 1996 his truck's lug nuts were loosened, almost causing an accident.

Mems and Brown testified that unlike Caucasian firefighters, they were required to wear their full turn out gear to fires. District Chief Verros testified that all Fire Equipment Operators are required to wear their full turn out gear for safety reasons.

3. Khaliq and District Chief Zillion in Station 14

In December 1998, while Khaliq was working in station 14, District Chief Zilliox denied Khaliq a meal hour over the Christmas holiday, and in response, Khaliq filed a race harassment complaint against Zilliox. Chief Zilliox testified that due to staffing levels, he could not give everyone a meal hour, and that, accommodating as

many people as possible, several firefighters at several stations could not take a meal hour.

C. Procedural history

Appellants commenced this action in the United States District Court for the District of Minnesota [FN3] in 1997, alleging violations of Title VII and the MHRA including discriminatory promotional practices, discriminatory disciplinary practices, and a hostile work environment. On May 28, 1999, the district court granted summary judgment for the City, dismissing all claims. On appeal to this court, we reversed in part, fording genuine issues of material fact as to Appellants' disparate treatment claim. *Mems v. City of St. Paul*, 224 F.3d 735 (8th Cir.2000).

> FN3. The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, presided over this case initially. After we reversed in part the district court's grant of summary judgment for the City, the Honorable Paul A. Magnuson presided over the trial.

> On November 19, 2001, the jury trial commenced. After a three-week trial and ten days of jury deliberation, the jury found the City liable to Appellant Webb only. Specifically, the jury found (1) in favor of Appellant Webb, awarding him $1 in damages; (2) that Appellants Mems and Khaliq failed to establish that the City knew or should have known of the harassment and failed to take prompt and effective remedial action; (3) that Appellant Brown failed to establish that harassment affected a term, condition, or privilege of his employment; and (4) that Appellant Smith failed to establish a causal nexus between the harassment and his race. The district

court entered final judgment on the verdict on February 15, 2002, and denied Appellants' subsequent motion for a new trial. This appeal follows.

II.

Appellants present four arguments on appeal. First, Appellants claim that the *779 district court abused its discretion in numerous evidentiary rulings. Second, Appellants claim that the district court abused its discretion in jury instructions 12, 16, 18, and 22. Third, Appellants argue that the district court applied the wrong damages period to Appellants' claims. Fourth, Appellants claim that the district court abused its discretion in denying their motion for a new trial.

A. Evidentiary Rulings

First, Appellants argue that the district court abused its discretion by excluding (1) the expert testimony of Dr. John Taborn, and (2) other evidence of their prima facie case. We disagree.

I. Dr. Taborn's Testimony

Appellants proffered Dr. Taborn's testimony as an expert witness on emotional damages. [FN4] The City challenged the introduction of Dr. Taborn's testimony in a motion in limine. After a *Daubert* hearing, the district court denied the motion.

Subsequently, the district court excluded the testimony on two grounds: (1) as a discovery sanction pursuant to Federal Rule of Civil Procedure 37; and (2) upon reconsideration of its earlier *Daubert* ruling, the district court decided to reverse its earlier ruling. Appellants

argue that the district court erred in barring the expert testimony of Dr. Taborn. We disagree.

> FN4. We note that Dr. Taborn was excluded as a expert damages witness. The jury only reached the issue of *damages* for Appellant Webb. Thus, only Appellant Webb can claim the alleged adverse effects of the district court's evidentiary ruling regarding Dr. Taborn.

[1][2][31 A district court's decision to impose a discovery sanction under Federal Rule of Civil Procedure 37 will not be reversed by this court, absent abuse of discretion. *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1019 (8th Cir. 1999) (citation omitted). Similarly, this court reviews a district court's decision to exclude expert testimony for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Ultimately, Appellants must show two things to gain relief from a faulty evidentiary ruling: (1) that the district court abused its discretion, and (2) that the evidentiary ruling was prejudicial to the point of producing a different verdict. *See Bevan v. Honeywell, Inc.*, 118 F.3 d 603, 612 (8th Cir.1997).

[4] "In order to impose sanctions under Rule 37, there must be an order compelling discovery, a willful violation of that order, and prejudice to the other party." *Chrysler Corp.*, 186 F.3d at 1019 (citation omitted). The district court found a willful violation of the expert pretrial discovery order and prejudice to the City because of that violation. Accordingly, the district court excluded Dr. Taborn's testimony as a sanction for Appellants' "egregious abuse of the judicial process." D. Ct. Op. at 3.

Under Federal Rule of Civil Procedure 26(a)(2)(B) a testifying expert must submit a signed written report prior to trial, containing, *inter alia*, "a complete statement of all opinions to be expressed and the basis and reasons therefor" and "the data or other information considered by the witness in forming the opinions." Fed.R.Civ.P. 26(a)(2)(B) (2003). Additionally, the district court's pretrial orders required expert discovery and disclosure to be completed before trial commenced. Under Federal Rule of Civil Procedure 26(e), a party is required to supplement and seasonably amend disclosures.

Dr. Taborn re-interviewed each Appellant during the recess week of trial. Dr. ***780** Taborn took notes of these meetings; these notes include factual allegations and symptoms not in Dr. Taborn's other reports. The meetings and the notes were not disclosed to the City until after business hours on the night before Dr. Taborn was scheduled to testify. The district court, pursuant to Federal Rule of Civil Procedure 37, finding that "granting a continuance or rescheduling the testimony of Dr. Taborn was insufficient to remedy Plaintiffs' egregious abuse of judicial process," excluded Dr. Taborn's testimony. D. Ct. Op. at 3.

[5] The main argument that Appellants rely on is that the district court inaccurately determined that Dr. Taborn's notes were a supplemental report and thus abused its discretion in excluding the testimony. However, the City correctly points out that the rules required Appellants to disclose "a complete statement of all opinions to be expressed and the basis and reasons therefor" and "the data or other information considered by the witness in forming the opinions" and to supplement that disclosure if necessary. Fed.R.Civ.P. 26(a)(2)(B), 26(e). Appellants failed to do so.

Despite Appellants' arguments, the district court was well within its discretion in excluding the testimony as a sanction for failure to comply with the rules of discovery: *See Chrysler Corp.*, 186 F.3d at 1022 (discussing that a district court need not impose the least onerous sanction and that sanctions are not only to penalize, but to deter). Accordingly; it is unnecessary to review the district court's reconsideration of its *Daubert* ruling. We conclude that the district court did not abuse its discretion in excluding the testimony of Dr. Taborn.

2. Other Evidence

Appellants claim that the district court abused its discretion by unfairly excluding other evidence that would have established their prima facie case of discrimination [FN5]: (1) two photographs of A-shift Captain Ness that were posted at station 20 and testimony regarding the photographs; (2) evidence regarding a hangman noose carved into a piece of furniture; (3) testimony regarding a conversation between B-shift Captain Dubois and A-shift Captain Ness; (4) testimony of witnesses showing racial motivation; (5) testimony of Debra Giles Smith; and (6) evidence that Appellants failed to take promotional exams and retired early. [FN6] We disagree.

> FN5. These evidentiary rulings could not have any bearing on Webb's case because the jury found that he had proved liability. Also, because Smith typically did not work the A shift, many of the evidentiary rulings complained of would not affect his claim.
>
> FN6. As to the evidence that Appellants retired early, Appellants also suggest that they should have been allowed to amend their Complaint to include a claim of constructive discharge.

However, as recognized by the district court, Appellants never requested leave to amend their Complaint and this claim is completely without merit.

[6] As mentioned above, Appellants must show that the district court abused its discretion and that the ruling was prejudicial to the point of producing a different result. *See Bevan*, 118 F.3d at 612. Having thoroughly reviewed the record and the parties' arguments, we find no abuse of discretion. Moreover, even assuming *arguendo* there was an error, we are convinced that the rulings would not have altered the outcome of the jury verdicts.

B. Jury Instructions

[7][8][9][10] Second, Appellants argue that the district court abused its discretion in its formulation of jury instructions 12, 16, ***781** 18, and 22. We review a district court's jury instructions for abuse of discretion. *Warren v. Prejean*, 301 F.3d 893, 900 (8th Cir.2002) (citing *B & B Hardware, Inc. v. Hargis* Indus., Inc., 252 F.3d 1010, 1012-13 (8th Cir.2001)). We note that "a district court has broad discretion in instructing the jury, and jury instructions do not need to be technically perfect or even a model of clarity." *B & B Hardware*, 252 F.3d at 1012-13 (citations and internal quotations omitted). Our review is limited in scope: we ask "whether the instructions, taken as a whole and viewed in the light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 711 (8th Cir.2001) (quoting *White v. Honeywell, Inc.*, 141 F.3d 1270, 1278 (8th Cir.1998)) (internal quotations omitted). We will reverse only upon a finding that the instructional error affected the

substantial rights of the parties. Id. (quoting *Honeywell*, 141 F.3d at 1278).

1. Jury Instruction Number 12

Instruction number 12, entitled "The Issue," reads as follows:

> [i]t is unlawful for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such an individual's race.
> In this case, each Plaintiff claims that Defendant City of St. Paul discriminated against him because of his race. Plaintiffs claim that they were subjected to a racially hostile or abusive working environment. *Defendant City of St. Paul denies this charge and claims that Plaintiffs unreasonably failed to take advantage of corrective opportunities.*

J.A. at 389 (emphasis added). Appellants suggest that the City never claimed that Appellants failed to take advantage of corrective opportunities. We disagree.

[11] [12] In fact, the City did claim that Appellants failed to take affirmative steps to mitigate the situation, and furthermore offered proof that Appellants failed to avail themselves of the City's anti-harassment complaint procedures. Proof that an employer promulgated an anti-harassment policy with complaint procedures and proof that an employee failed to use the complaint procedures is relevant in determining employer liability for a supervisor's alleged racial harassment that does not result in a tangible injury, as it may constitute a defense. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998). Therefore, we find no abuse of discretion by the district court with regard to instruction number 12.

2. Jury Instruction Number 16

[13] Instruction number 16, entitled "Unwelcome Harassment," states that "[i]n order to constitute harassment, the conduct must be 'unwelcome' in the sense that each Plaintiff did not solicit or invite it, and each Plaintiff regarded the conduct as undesirable or offensive." J.A. at 394. We need not resolve Appellants' complaints with regard to this instruction because the jury found that each Appellant suffered unwelcome harassment, and accordingly, the argument is moot.

3. Jury Instruction Number 18

[14][15][16] Instruction number 18, entitled "Hostile or Abusive Work Environment," provides:

> [i]n order for a racially hostile environment to be actionable, it must be so severe or pervasive as to alter the conditions *782 of each Plaintiffs employment and create an abusive working environment.
>
> Each Plaintiff, in other words, must show a practice or pattern of harassment against him. A single incident or isolated incidents generally will not be sufficient. Whether racial harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well-being of employees is a question to be determined in light of the totality of the circumstances.
>
> In determining whether a reasonable person in each Plaintiffs circumstances would find his work environment to be hostile or abusive, the relevant factors to consider include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; whether it unreasonably

interferes with an employee's work performance; the physical proximity of the harasser; and the presence or absence of other people.

Simple teasing, offhand comments and isolated incidents (unless extremely serious), however, will not amount to discriminatory changes in the terms and conditions of employment. For example, the mere utterance of an ethnic or racial epithet which engenders offensive feelings in a Plaintiff may not sufficiently alter the terms and conditions of employment. Discourtesy and rudeness should not be confused with racial harassment and a lack of racial sensitivity, does not, alone, amount to actionable harassment. The law governing racial discrimination does not create a claim for all unpleasant or abusive behavior in the workplace; it is not a general civility code and does not apply to the normal tribulations of the workplace, such as the sporadic use of abusive language, race-related jokes and occasional teasing. The conduct must be extreme to amount to a change in the terms and conditions of employment.

A Plaintiff may only rely on evidence relating to discrimination that he was aware of during the time that he was allegedly subjected to a hostile work environment. A Plaintiff cannot subjectively perceive behavior towards others as creating a hostile work environment unless he knew about the behavior.

J.A. at 396-97. Appellants claim that the elements of hostile and abusive work environment in instruction number 18 differed from the elements in instruction number 15, [FN7] and that the examples in instruction number 18 unfairly commented on the Appellants' evidence and their case. We disagree.

FN7. Instruction number 15, entitled "Elements of Claim," provides:

[y]our verdict must be for each Plaintiff on his claim of a hostile working environment if each Plaintiff proves all of the following elements by a preponderance of the evidence:

(1) He was subjected to unwelcome harassment;

(2) There was a causal nexus or a motivating factor between the harassment and his race;

(3) The harassment was sufficiently severe or pervasive that a reasonable person would find that the harassment affected a term, condition, or privilege of employment;

(4) Defendant knew or should have known of the harassment and failed to take prompt and effective remedial action.

Each Plaintiff must establish all of these elements. If any of the Plaintiffs does not prove any of the above elements by a preponderance of the evidence, your verdict must be for the Defendant with regard to that Plaintiff and you need not proceed further in considering that Plaintiffs claim.

J.A. at 393.

[17] First, instruction number 18 explains in more detail the contours of the elements of a hostile work environment, *783 but does not conflict with instruction number 15. Second, Appellants cite *Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216 (8th Cir.1997), and *Tyler v. Hot Springs School District No. 6*, 827 F.2d 1227 (8th Cir.1987), as supporting their claim that the district court, in instruction number 18, unfairly commented on Appellants' evidence. In *Caviness*, we warned that a district court should not put "undue emphasis" on one party's evidence. 105 F.3d at 1222 (citation omitted). In

Tyler, we held that the district court did not err in refusing to give an instruction that overemphasized certain evidence and could have misled the jury. 827 F.2d at 1231-32. These cases do not support Appellants' argument. Nothing in these cases suggests that a district court may not give examples to clarify instructions. Furthermore, the examples given by the district court in instruction number 18 do not unfairly comment on the evidence in this case. The examples are simply hypothetical examples for the purpose of clarity on what constitutes discriminatory changes in the terms and conditions of one's employment. Third, Appellants argue that the district court should have adopted their proposed instruction instead of instruction number 18. The district court was well within its discretion in using instruction number 18, which is supported by Eighth Circuit Model Instruction 5.42. Accordingly, we find no abuse of discretion by the district court with regard to instruction number 18.

4. Jury Instruction Number 22

[18] Instruction number 22, entitled "Damages Period," provides:

> [e]ach Plaintiff, may only recover damages on his race discrimination claim for unlawful acts occurring within the period listed on his Special Verdict Form. Evidence has been presented of acts that occurred outside of this period; however, such acts serve only to establish relevant background information. You may not award damages for any acts which occurred outside of the period listed on each Plaintiffs Special Verdict Form.

J.A. at 402 (emphasis added). Appellants argue that "unlawful acts" was never defined and misled the jury. We note that this instruction can only affect Webb, as the jury only reached the issue of damages in his case.

In light of the jury instructions as a whole, we find that this term was not misleading. Accordingly, we find no abuse of discretion.

C. Damages Period

Third, Appellants argue that the district court inappropriately narrowed the damages period: (1) Appellants argue that the district court erred in limiting the damages period under MHRA to one year; and (2) Appellants argue that in light of the new rule for damages in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the district court incorrectly limited the damages period under Title VII. We must note initially that these arguments regarding the damages period only apply to Appellant Webb because the jury did not reach damages for any of the other Appellants. At trial, Webb contended that he should be able to recover damages for illegal acts occurring since the June 1994 settlement. [FN8] The special verdict form and instruction number 22, however, directed the jury to award damages for injuries Webb suffered between November 5, 1995, *784 and the date of his retirement, May 31, 2001.

> FN8. Although he was not a party to the settlement, Webb voluntarily limited his claims to post-settlement acts.

In Appellants' opening brief, they argued that the correct damages period under the MHRA would allow Appellants to recover under the continuing violation theory and thus allow consideration of otherwise time-barred acts as part of the continuing violation. The Appellants' argument with regard to the damages period under MHRA has merged into the argument regarding *Morgan*. The MHRA requires that all charges of discrimination be filed with the EEOC within one

year of the alleged discrimination. *See* Minn.Stat. § 363.06. [FN9] The district court limited Webb's damages period to acts occurring within the one-year statute of limitations period. The district court justified the narrow damages period by noting first that there was no Minnesota case law on the issue, and second that the rationale for allowing damages to be recovered only with respect to events that occurred within the limitations period under Title VII, under *Madison v. IBP, Inc.*, 257 F.3d 780, 796-97 (8th Cir.2001), *vacated and remanded*, 536 U.S. 919, 122 S.Ct. 2583, 153 L.Ed.2d 773 (2002), applied similarly to the MHRA. Under Eighth Circuit case law at the time of the district court's decision regarding the damages period, under Title VII, employees could only recover damages "for act committed during the statute of limitations period, even if there was a continuing violation." *Id. at* 797. While this appeal was pending, the Supreme Court vacated *Madison* in light of its decision in *Morgan*. Thus, the correct damages period to be applied to Webb's claims depends on how *Morgan* affects this case. How the new rules handed down in *Morgan* affect Eighth Circuit precedent are questions of law and should be reviewed de novo. *Wal-Mart Stores, Inc. v Crist*, 855 F.2d 1326, 1330 n. 4 (8th Cir.1988). [FN10]

> FN9. Note that technically Webb's claim under Title VII would be subject to a 300-day limitation period, *see* 42 U.S.C. § 2000e-5(e)(1); however, the city stipulated to a one-year limitation period for all claims in order to simplify matters.
>
> FN 10. We recognize that in *Treanor v. MCI Telecommunications Corp.*, 200 F.3d 570 (8th Cir.2000), this court stated that the MHRA's statute of limitations could be avoided by application of the continuing violation doctrine. However, that case relied on *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn. Ct.App.1994),

which relied on Title VII case law in other circuits as supporting the continuing violation theory. *Id.* (citing *Lane v. Ground Round, Inc.*, 775 F.Supp. 1219, 1224 (E.D.Mo.1991) (discussing Title VII cases applying the continuing violation theory (citing *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 474 (5th Cir.1989); *Berry v. Bd. of Supervisors*, 715 F.2d 971, 979 (5th Cir.1983); *Laffey v. Northwest Airlines*, Inc., 567 F.2d 429, 472 (D.C.Cir.1976)))).

Because our ruling in *Treanor* was based on case law altered by the Court's decision in Morgan, we think *Morgan* equally affects the vitality of the continuing violation doctrine as it applies to the MHRA.

[19] In *Morgan*, the Supreme Court held that "[a] charge alleging a hostile work environment claim ... will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." 122 S.Ct. at 2077. The question for liability as well as damages after *Morgan* is whether the acts complained of are part of the same unlawful employment practice. If so, then all of the acts may be considered so long as one of the acts falls within the limitations period. If not, then only the acts which fall in the limitations period may be considered.

[20][21] The Supreme Court explained the difference between discrete discriminatory acts and a series of separate acts that *785 together constitute an "unlawful employment practice," 42 U.S.C. § 2000e-5(e)(1). Id. at 2069-76. A discrete act " `occurred' on the day that it 'happened' " and constitutes its own unlawful employment practice. Id. at 2070. Examples of discrete acts include "termination, failure to promote, denial of transfer, or refusal to hire." Id. at 2073. "Discrete acts

that fall within the statutory time period do not make timely acts that fall outside the time period." *Id.* at 2071.

On the other hand, the Supreme Court opined that a hostile work environment claim typically involves a series of separate acts, which together constitute the unlawful employment practice. Id. at 2074. Because these acts are part of the same claim, the Court held that an employer may be liable for all of the acts, and in order for the claim to be timely, only one act in the series must have occurred within the limitations period. *Id.*

The Court explained that first "[a] court's task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice," and second the court must determine whether any act that is part of the same claim falls within the statutory time period. Id. at 2076.

In the case at bar, the jury found the City vicariously liable for the harassment against Webb. In order to find the City liable under Title VII and the MHRA, [FN I 1] the jury had to first find "unwelcome harassment based on race which is sufficiently severe or pervasive as to affect a term, condition, or privilege of employment." *Bowen v. Mo. Dept of Soc. Servs.*, 311 F.3d 878, 883 (8th Cir.2002) (citation omitted). To the extent the racial harassment Webb complained of was committed by co-workers, the jury also had to find that the City knew or should have known about the harassment and failed to take effective remedial measures, or in other words, that the City was negligent. *Id.* The jury instructions reflected these elements. The only possible set of incidents for which the evidence supports a finding that these elements were met is the events that took place regarding McCardle and Webb and the City's response to these events. This is precisely what the jury found, as

evidenced by the fact that for two of the four other B-shift Appellants, under the same set of facts as Webb, only without their own McCardle-type incident and response thereto, the jury found a hostile work environment, but that there was no harassment that occurred that the City failed to promptly and effectively remedy.

> FN 11. We look to Title VII case law to analyze both claims. *See Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570, 574 (8th Cir.1997) ("In analyzing cases under the MHRA, the state courts apply the principles developed in the adjudication of claims under Title VII because of the substantial similarities between the two statutes.") (citation omitted); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986).

[22] The McCardle incident, and the City's response thereto, involved a series of discrete events each constituting its own unlawful employment practice. Those occurring after November 5, 1995, and so within the damages period, include the reprimand of Webb for intimidating McCardle, the rejection of Webb's race harassment charge against McCardle, and the order to report for a fitness-for-duty exam. These discrete acts were properly before the jury under instruction number 22 and the special verdict form. Moreover, these discrete acts, under *Morgan*, cannot be used to revive pre-limitations acts for the purposes of recovering damages because they are separate and distinct unlawful employment practices. *786122 S.Ct. at 2071-72 (explaining that "discrete acts that fall within the statutory period do not make timely acts that fall outside the time period" and "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges"). Accordingly, we find that, even though the law and

analysis have changed since *Morgan*, the district court applied the correct damages period.

D. New Trial Motion

[23][24] Finally, Appellants claim that the district court should have granted their motion for a new trial. We review the denial of a motion for a new trial for abuse of discretion. *Jones v. TEK Indus., Inc.*, 319 F.3d 355, 358 (8th Cir.2003) (citation omitted). Grant of a motion for a new trial is only appropriate "if the verdict is against the great weight of the evidence and [ ] allowing it to stand would result in a miscarriage of justice." *Id.* (citation and internal quotation omitted).

Appellants claim that the district court abused its discretion because the jury's verdict was against the great weight of the evidence, warranting a new trial. Having thoroughly reviewed the record, we disagree and find no abuse of discretion in the denial of the new trial motion.

III.

For the aforementioned reasons, we affirm.

HEANEY, Circuit Judge, dissenting.

I dissent from Section II.C. of the majority's opinion, which misinterprets and misapplies the damages analysis presented in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002). I would grant Appellants a new trial because the district court erred by narrowing Appellants' damages period for their claim under the Minnesota Human Rights Act (MHRA).

At trial, Appellants contended that they should be able to recover damages for all acts contributing to the hostile work environment that took place beginning in June of 1994 (the time the prior race discrimination suit was settled). The district court disagreed, and narrowed the damages period to one year under the MHRA. Thus, while the jury heard evidence of racially hostile acts occurring as far back as 1994, it could only award damages for a limited period for each plaintiff. [FN 12] The district court based its ruling on *Madison v IBP, Inc.*, 257 F.3d 780, 796-97 (8th Cir.2001), which held that plaintiffs may only recover damages on their hostile work environment claims for acts committed within the statute of limitations period, even if there were continuing violation. This conflicts with the law as explained by the Supreme Court in *Morgan*.

> FN 12. For Smith and Webb, the court limited the jury's consideration of damages to acts occurring since November 5, 1995; for Mems, damages were limited to acts occurring since April 15, 1996; Brown's statutory damages period was limited to acts occurring since April 16, 1996; and Khaliq's damages period was limited to act occurring since April 22, 1996.

In *Morgan*, the Court reaffirmed that claims are to be divided into two categories: those based on discrete discriminatory acts, and those based on a hostile work environment. *Morgan*, 122 S.Ct. at 2071-75. Discrete discriminatory acts include failing to promote, denial of a transfer, and refusing to hire. Id. at 2073. Because each of these acts could independently support a discrimination claim, the statute of limitations runs independently for each discrete act. Id at 2071. In contrast, the Court held that because hostile work environment claims attack one continuing unlawful *787 employment practice, the statute of limitations

does not apply so strictly to these claims. Id. at 2075. Rather, a plaintiff alleging a hostile work environment can recover damages for acts occurring outside the statute of limitations, so long as any act contributing to the hostile environment occurred within the statutory period. Id. This, obviously, was at odds with our decision in *Madison*, and, consequently, also at odds with the framework used by the district court in this matter. *See Madison v. IBP, Inc.*, 536 U.S. 919, 122 S.Ct. 2583, 153 L.Ed.2d 773 (2002) (mem.) (granting certiorari, vacating judgment, and remanding for further consideration in light of *Morgan*).

> The majority recognizes that the district court used the wrong legal analysis, yet holds Appellants are not entitled to relief. In so doing, the majority posits that our analysis should be limited to Webb because he was the only plaintiff to recover damages. This is simply incorrect. *Morgan*, in fact, announced the opposite proposition: the plaintiff *need not* prove damages occurred within the statutory period so Long as any act contributing to the hostile work environment did. *See Morgan*, 122 S.Ct. at 2073 ("The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."). Our circuit has, until now, interpreted *Morgan* accordingly. See *Jensen v. Henderson*, 315 F.3d 854, 859 (8th Cir.2002) ("Only the smallest portion of that [unlawful employment] 'practice' needs to occur within the limitations period for the claim to be timely."). The majority diverges from that beaten path. By holding that a hostile work environment plaintiff must prove damages within the statutory period before a jury can

> consider acts beyond the statutory period, essentially returns our circuit to its position in *Madison*, a framework squarely rejected by the Supreme Court.

As illustrated above, the proper question is not whether Appellants proved *damages* from conduct within the statutory period, but rather whether *any act* contributing to the allegedly hostile work environment took place within the statutory period. Clearly, each of these plaintiffs produced such evidence: Smith was the subject of what he contends was an unreasonable search of his locker and belongings due to his race in 1996, and the B shift firefighters-- Mems, Brown, Webb, and Khaliq--presented evidence that they were victims of a plethora of racially-motivated acts, all of which occurred within each's respective statutory limitation period.

Each of the plaintiffs satisfied *Morgan* 's threshold requirement of alleging some act contributing to the hostile work environment that is not time-barred. Accordingly, each of the plaintiffs was the victim of trial court error when the court limited their respective damages periods. This error prevented the jury from fully considering numerous acts that occurred in 1994, 1995, and, for some of the plaintiffs, in 1996. Obviously, consideration of these acts may have changed the jury's mind. I therefore believe a new trial is appropriate for all Appellants, with the district court employing the analysis put forth by the Supreme Court in *Morgan*.

Even if the majority's position were to stand, its analysis with regard to Webb is flawed. The majority suggests that the district court properly limited the damages period for Webb because all of the acts that Webb alleged to have happened within the statutory period were discrete acts rather than part of a hostile work

environment. *See Ante* at 785 ("[T]hese discrete acts, under *Morgan*, cannot be used to revive pre-limitations acts for the purpose of recovering damages because they are separate and distinct unlawful employment *788 practices." (citing *Morgan*, 122 S.Ct. at 2071-72)).

While it may be that Webb's reprimand and the rejection of Webb's discrimination claim were discrete acts of discrimination, *see Morgan*, 122 S.Ct. at 2073 (noting discrete discriminatory acts include failing to promote, denial of a transfer, refusing to hire), the majority overlooks the other acts complained of by the B shift firefighters: racially offensive cartoons and magazines left at the station; vandalism of B shift amenities at the station; and the loosening of Webb's vehicle lug nuts while he was at work, to name a few. All of these acts happened within the statutory limitations period. Clearly, these are not independently actionable discrete acts, but rather are acts contributing to Webb's claim that he, along with other B shifters, was subjected to a racially hostile work environment. Thus, the majority has not only misinterpreted *Morgan*, it has misapplied its own analysis to plaintiff Webb. Accordingly, I dissent.

327 F.3d 771, 91 Fair Empl.Prac.Cas. (BNA) 1176, 84 Empl. Prac. Dec. P 41,432, 55 Fed.R.Serv.3d 1198, 61 Fed. R. Evid. Serv. 240

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1834

Robert Mems; Nathanial Khaliq;
Phillip Webb; Thurman Smith;
Byron Brown,

Appellants,

v.

City of St. Paul, Department of
Fire and Safety Services,

Appellee.

Appeal from the
United States
District Court for the
District of Minnesota.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. (5172-010199)

April 30, 2003

Order Entered in Accordance with Opinion:

s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1834

Robert Mems, et al.,

Appellants,

v.

Order Denying Petition for Rehearing and for Rehearing En Banc

City of St . Paul, Department of Fire and Safety Services,

Appellee.

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

July 23, 2003

Order Entered at the Direction of the Court:

s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
NOV 24 2003
OFFICE OF THE CLERK

No. 03-609

In the Supreme Court of the United States

ROBERT MEMS, NATHANIAL KHALIQ, PHILLIP WEBB, THURMAN SMITH, AND BYRON BROWN,

Petitioners,

VS.

THE CITY OF ST. PAUL – DEPARTMENT OF FIRE AND SAFETY SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' Title VII hostile environment claims were tried to a jury. The district court set the damages period on each verdict form based upon then-applicable circuit precedent. The jury found only Phillip Webb proved liability, and awarded him nominal damages. While the parties were briefing the appeal, this Court decided National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), which prescribed new rules governing the damages period in a hostile environment claim. Applying Morgan retroactively, the court of appeals held that the new rules mandated the same result on Webb's unique facts.

The questions presented are:

I. Does the opinion of the court of appeals conflict with Morgan?

II. Did the court of appeals, affirming various evidentiary rulings, sanction such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power?

LIST OF PARTIES

Respondent is the City of Saint Paul, Minnesota, a municipal corporation. The Department of Fire and Safety Services is an executive department of the City of Saint Paul, with no independent legal capacity to sue or be sued. In all other respects, the caption accurately lists the parties.

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OPINIONS BELOW

The second opinion of the court of appeals in this case (Pet. App. 23-52), from which Petitioners now seek relief, is reported at 327 F.3d 771. The opinion of the district court denying Petitioners' new trial motion (Pet. App. 15-22) is unreported. The opinion of the district court ruling on motions in limine (Pet. App. 1-12) is unreported. The first opinion of the court of appeals, reversing in part the grant of summary judgment, is reported at 224 F.3d 735. The opinion of the district court granting summary judgment is reported at 73 F.Supp.2d 1031.

JURISDICTION

The court of appeals denied Petitioners' request for rehearing on July 23, 2003. Petitioners filed the petition for a writ of certiorari on October 21, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioners commenced this suit against the City of Saint Paul ("City") in 1997, asserting claims under Title VII, 42 U.S.C. § 2000e-2 (1994), and the Minnesota Human Rights Act, Minnesota Statutes § 363.03 (2002), for discriminatory promotional practices, discriminatory disciplinary practices, and hostile work environment. The district court denied Petitioners' motion to certify a class action. On May 28, 1999, the district court granted the City's motion for summary judgment, dismissing all claims. The Court of Appeals for the Eighth

Circuit reversed in part, remanding for trial only the hostile work environment claim.

Commencing November 19, 2001, Petitioners presented their cases to the jury in a trial lasting three weeks. The jury deliberated for ten days and found each Petitioner, except Phillip Webb, had failed to prove liability. The jury found the City liable to Webb, but also found his damages had no monetary value and awarded nominal damages. The opinion below accurately describes each verdict. *See* Mems v. City of St. Paul, Dept. of Fire and Safety Services, 327 F.3d 771, 778 (8th Cir. 2003) (Pet. App. 32). Petitioners filed a memorandum arguing that the district court made various errors and that the verdicts were against the weight of the evidence. Treating the filing as a new trial motion, the district court denied the motion. The court of appeals affirmed and denied a petition for rehearing.

The opinion of the court of appeals accurately summarizes the main facts necessary to an understanding of the issues presented for review. Petitioners' recitation of the highly contested facts adduced at trial, however, is unbalanced and accords no deference to the jury's findings. Respondent submits the following summary to address the misleading statement of facts in the petition.

I. Background.

The fire suppression operations of the Department of Fire and Safety Services ("SPFD") are organized into three shifts, known as the A, B, and C shifts. Each shift is on duty for 24 hours, and the firefighters live, eat, and work at their station while on duty. Firefighters select the shift and station

where they will work through a seniority-based bid system. In this case, for example, Petitioners Robert Mems, Nathanial Khaliq, Byron Brown, and Phillip Webb all elected to work on the B shift at Station 20. With the exception of two white captains, their shift was composed of African-Americans. If the shift was what Petitioners call "racially segregated," the choice was their own. Petitioner Thurman Smith elected to work on the C shift at Station 20. He was the only African-American on his shift.

In February, 1992, newly appointed Fire Chief Timothy Fuller issued General Order No. 153, entitled Policy of Respect. The order states that it is the policy of the SPFD administration to provide a work environment that ensures equal opportunities and mutual respect for all employees. It requires all SPFD members to treat every employee with dignity and respect. In July, 1995, the City promulgated its Workplace Conduct Policy which prohibits discrimination and other offensive behavior. It provides that all complaints will be investigated promptly, fairly, and completely. In conjunction with the promulgation of the policy, Fuller, Mayor Norm Coleman, and the City's affirmative action director made a videotape expressing the importance of the policy and their expectation that it be followed. The SPFD played the videotape in every fire station.

In June, 1994, the City settled a race discrimination lawsuit brought by eleven African-American firefighters, including then-Captain Anthony Carter and all of the Petitioners except Webb. That case alleged acts of discrimination that occurred prior to Fuller's tenure as Fire Chief. Pursuant to the settlement agreement, the SPFD created a new assistant chief position (the second highest rank in the department) to be

responsible primarily for human relations. Fuller selected Carter to fill the position from a list of three names provided by Black Fire Fighters United.

II. B Shift Cases.

Petitioners on the B-shift complained about housekeeping issues, windows left open, the thermostat turned up, and things misplaced in kitchen. Captain DuBois of the B shift testified the housekeeping issues were not race related, and that it is common for shifts to have such disputes. Additionally, the complaints were never contemporaneously reported to DuBois and he never saw the windows opened or thermostat turned up himself, though he was usually the first one to arrive.

When Petitioners complained about an e-mail Firefighter Montanari sent about the 1994 settlement, Khaliq was impeached with the fact that he never identified the existence of such a complaint prior to April, 2001. Likewise, Brown was impeached with the fact that he never indicated he had seen the e-mail prior to trial.

In January, 1995, the A shift complained that the B shift was staying past 8 a.m., and using the showers and bathrooms, which interfered with the A shift's housekeeping duties. The B shift captains, DuBois and Ross, asked the B shift to be out of the showers and bathrooms by 8 a.m., and everyone on the B shift agreed that was reasonable. Nevertheless, on several occasions B shift members continued to remain after their shift, staying in bed, working out, or using the showers, thereby interfering with the A shift's morning duties. On January 14, 1995, A shift Captain Bergstrom asked a B shift captain to

remind his men to empty the dishwasher, and the B shift captain did so over the loudspeaker. A moment later, Webb came down to the watch office acting confrontational and told Bergstrom, "You didn't have to come down and tell on us! . . . I'll never talk to you again!" Webb then got on the loudspeaker himself and said, "Bob [Mems], he couldn't wait to come down and tell on us." Another confrontation developed when an A shift firefighter, Korte, reminded someone about the dishwasher. Khaliq jumped off the treadmill, stood directly in front of Korte, and yelled that it was not his business to notify people the dishwasher was full.

These incidents were reported to A shift District Chief Verros, who passed them on to B shift District Chief Bataglia. In response, Bataglia noted this was a recurring problem that had surfaced about nine months earlier, and ordered the B shift to leave the station at 8 a.m. Mems complained to Carter. Carter immediately rescinded the order before it could take effect and directed the district chiefs to consult with him before taking action of a similar nature again. Carter investigated the matter and, while he felt Chief Bataglia had not exercised wisdom, he found no evidence of race discrimination. Carter also went to Station 20 and met with every member of the A shift, telling them that no discrimination, or even the perception of discrimination, would be tolerated.

Mems complained that someone had tampered with his helmet and bunker pants, and that someone had left the gear shift on the fire engine in pump mode instead of drive mode. However, investigation showed the helmet and pants just experienced normal wear and tear. Captain Ross, of the B shift, did not think anyone intentionally left the gear shift in pump

mode, and Carter concluded it was likely accidental. When Brown raised equipment tampering claims, he was impeached by the fact he had never mentioned them prior to trial.

Webb testified that a basketball hoop behind the station was damaged a couple of times. He never witnessed what happened to the hoop, but admitted that it was located on a lot where tractor-trailers park, and that a truck hit the basketball hoop on one occasion. The trailers parked in the lot were taller than the basketball rim. Ross testified the trucks always parked in the vicinity of the basketball hoop.

Petitioners complained about offensive editorial cartoons from the *Conservative Chronicles* newspaper which they found in the station. Petitioners described them as "racist" because they were drawn in the caricature style typical of editorial cartoons and criticized affirmative action. After Webb complained to the City, no offensive cartoons ever appeared in the station again.

Brown and Mems complained that District Chief Verros ordered them to put on their full turnout gear, including bunker pants and boots. Fire Equipment Operators (FEO's) like Brown and Mems were typically reluctant to wear this gear. Verros demanded, however, that all FEO's wear the gear because of the injuries which can occur when FEO's are called into immediate action. Two white FEO's testified that Verros also ordered them to put on the gear.

In May, 1995, A shift Captain Ness allowed an offensive photograph to be posted on the station bulletin board. On May 25, 1995, he received an oral reprimand for allowing the

posting to occur. As a result, Mems testified the atmosphere between the A and B shifts got "really thick."

Webb complained about McCardle's conduct during the shift change. Their arrangement was that McCardle relieved Webb by taking Webb's gear off the rig and replacing it with his own. Though the shift change officially occurred at 8 a.m., McCardle typically arrived and relieved Webb before 8 a.m. The 1994 settlement did not alter this routine. McCardle testified he never refused to take a run for Webb during the shift change. On May 16, 1995, at 7:27 a.m., the alarm sounded. McCardle had just arrived, and had not yet changed the gear on the rig, when he saw Webb heading down to take the call. They made eye contact and Webb kept coming, indicating to McCardle that Webb would take the run. This was no different than their usual routine. At the time, Webb did not suggest that he felt anything was out of the ordinary. McCardle then went out to his car to get a piece of gear he had taken home to wash. Walking toward the parking lot, Mems joked with McCardle that "[he'd] got out of that run," and McCardle replied in a joking manner, "We don't start till eight o'clock."

On July 1, 1995, at 7:48 a.m., a telephone alarm came in. The B shift was finishing its tour of duty and McCardle was already in the station. When McCardle arrived, he went straight up to the dorm area to take his gym bag to his locker, and then went to get some aspirin because he had a headache. He and his captain were talking in the dorm area when the alarm sounded. He had neither changed the turnout gear on the rig yet, nor seen Webb that morning. McCardle went to look for Webb to see if he was going to take the run and, when he got to the top of the stairs, he saw Webb getting onto the rig.

When Webb came back from the run, McCardle was sitting at the kitchen table. Webb came into the kitchen and asked McCardle if he wanted to start at 8 a.m. now. McCardle said he did not care, it was up to Webb. Webb grew very angry, said McCardle was trying to set him up, and called him a "chickenshit." Webb raised his voice, and kept yelling, getting more and more angry. Finally, Webb threw his gym bag down on the floor, clenched his fists, stepped toward McCardle, and said, "We'll handle this anyway you want." McCardle felt physically threatened by Webb. At that point, Khaliq came in and yelled Webb's name. McCardle and Khaliq both testified that McCardle had remained seated at the kitchen table. The incident ended when Webb picked up his gym bag, called McCardle a "girl" and a "chickenshit" again, and walked out, repeating "chickenshit A shift."

The next day, McCardle tried to explain to Webb what happened. Webb said that Mems had told him McCardle was laughing at him, and that he did not believe McCardle's explanation. The very next day, July 3, 1995, McCardle took another run for Webb before 8 a.m., and continued to take runs for him up to the time he retired in December, 1998. Webb never spoke to McCardle again.

In December, 1996, Khaliq was filling in back at Station 20, and left some personal magazines out on a work bench. When he returned the next day, two of them had been damaged. Carter personally interviewed everyone on the A shift and had the police test the magazines for fingerprints. Short of subjecting the men to lie detector tests, which was illegal, Carter could do nothing more. The investigation never identified a

culprit. After Khaliq made the complaint, however, no further similar incidents occurred.

Khaliq also complained at trial about the way District Chief Zilliox treated him at Station 14. Contrary to Khaliq's testimony, Zilliox described his relationship with Khaliq during the year they spent together at Station 14 as "very workable." Zilliox testified that Khaliq was a fine FEO. Zilliox was not aware of any conflicts or problems between them. Khaliq never expressed to Zilliox a belief that he was being treated differently. Khaliq also complained that Zilliox had denied him a holiday meal hour. Zilliox testified that due to staffing levels, he could not give everyone the meal hour, and that, accommodating as many people as possible, several firefighters at several stations could not take the meal hour. Zilliox left it to the stations that had fewer meal hours than firefighters to decide how they would divide up the hours allotted.

III. Smith's Case.

In August, 1994, Smith was filling in for one of the A shift firefighters. Firefighter Caruso reported he smelled alcohol on Smith's breath, so Captain Bergstrom and District Chief Wiesner asked Smith about it. Smith offered to let them smell his breath and satisfied them he did not have alcohol on his breath. Smith never had any problems with Caruso before or after this occasion, and had no idea why Caruso reported him. Smith testified that Caruso had sustained a serious head injury in a motorcycle accident and "is probably not all there." Smith testified that he, too, would report someone he believed came to work with alcohol on their breath. Smith never complained that he thought the incident was an act of discrimination. He

received exactly what he sought, a letter explaining the incident and confirming that the allegation was unfounded.

Smith alleged for the first time at trial that he had seen the *Conservative Chronicles* editorial cartoons the B shift firefighters found in 1995. He was impeached with admissions in prior testimony that he had not seen the cartoons.

In October, 1996, Smith had a heated dispute with Carlisle, an African-American firefighter on the B shift, in which he accused Carlisle of stealing from the C shift food locker. The next thing Smith knew, police officers came to the station and asked to search him and his effects. Carlisle had reported to Captain Ross of the B shift that he saw crack cocaine fall out of Smith's locker. Ross was not sure what to do about the allegation, so he mentioned it to Assistant Chief Carter. Carter called the police to investigate. Smith agreed that cocaine in the workplace is a serious allegation that demands investigation. Carter notified the police because the accusation was beyond the SPFD's purview and a crime if it proved true.

Smith had no problems with anyone on the C shift, though he was the only African-American on the shift. He testified that he gets along well with his C shift colleagues.

IV. Personality Conflict.

Fuller and Carter viewed the situation at Station 20 as one that needed conflict resolution. Conflicts between shifts at a station are common, regardless of race. Both the B shift captains, Ross and DuBois, testified that they did not get along on a personal level with the A shift captains for reasons having

nothing to do with race. The A shift felt that the problem with B shift was a personality conflict. Captain Ross, on the B shift, agreed that it was a personality conflict. Ross never witnessed anyone on the A shift express racial hostility toward the B shift.

ARGUMENT

Neither question presented by the petition for a writ of certiorari warrants further review in this Court. With respect to the first question, this Court should deny the petition because the opinion below does not conflict with National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), and does not raise an important question of federal law. With respect to the second question, the evidentiary rulings which the court of appeals unanimously affirmed bear no indicia of a departure from the usual and ordinary course of judicial proceedings. Petitioners advance no genuine reason for the exercise of supervisory power. Therefore, Petitioners merely ask this Court to sit as yet another court of error.

I. The Opinion below Does Not Conflict with Morgan and Does Not Raise an Important Question of Federal Law.

In Morgan, this Court handed down new rules for applying the statute of limitations in Title VII disparate treatment cases. *See, generally,* 536 U.S. at 113-18. The court of appeals faithfully discussed and applied the controlling principles handed down in Morgan. No district court now reading the Eighth Circuit's post-Morgan decisions should be confused about how to apply Morgan. Further, the decision has no broad importance because its harmless error analysis was

factbound, and the occasion to apply Morgan retroactively will not recur.

The court of appeals quoted Morgan extensively, and the majority and dissenting opinions agreed in their statement of the rules handed down in Morgan. *Compare* Mems, 327 F.3d at 784-785 (Pet. App. 45-46) *with id.* at 786-87 (Pet. App. 49-50) (Heaney, J., dissenting). Correctly reciting the Morgan rules, the majority opinion stated:

> In Morgan, the Supreme Court held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." 122 S.Ct. at 2077. The question for liability as well as damages after Morgan is whether the acts complained of are part of the same unlawful employment practice. If so, then all of the acts may be considered so long as one of the acts falls within the limitations period. If not, then only the acts which fall in the limitations period may be considered.

Mems, 327 F.3d at 784 (Pet. App. 45); *compare* Morgan, 536 U.S. at 117-18. Consistent with the majority opinion, the dissent wrote: "the plaintiff *need not* prove damages occurred within the statutory period so long as any act contributing to the hostile work environment did." Mems, 327 F.3d at 787 (Pet. App. 50) (emphasis in original). Further, and still consistent with the majority's above-quoted rule of law, the dissent wrote:

"the proper question is not whether [Petitioners] proved *damages* from conduct within the statutory period, but rather whether *any act* contributing to the allegedly hostile work environment took place within the statutory period." *Id.* (emphasis in original). Thus, the court of appeals correctly and consistently stated the law Morgan mandates. Therefore, the error Petitioners ask this Court to review is merely an alleged "misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10.

The majority and dissent parted company only when it came to applying Morgan to the trial record post hoc. The majority determined that "arguments regarding the damages period only apply to [Petitioner] Webb because the jury did not reach damages for any of the other [Petitioners]." Mems, 327 F.3d at 783 (Pet. App. 43). In other words, for Petitioners who failed to prove liability, that is, who failed to *reach* the damages question, any error regarding the damages period was harmless. The dissenting opinion upon which Petitioners rely, however, somehow concluded that the majority would require a plaintiff to prove damages occurred during the statutory period before they could recover. *Id.* at 787 (Pet. App. 50-51). Respectfully, the dissent was mistaken.

In the majority's analysis, the distinction between Webb and the others was not who *proved* damages occurred within the statutory period – none of them proved damages – but who *reached* the damage question at all. *See id.* at 783 (Pet. App. 43). The jury awarded Webb nominal damages, demonstrating that even he failed to prove damages. Thus, the fact that the court applied the Morgan analysis to Webb's claim confirms that, contrary to the dissent's reading, the court did not require

proof that damages occurred within the statutory period. For the purposes of establishing liability, Petitioners presented evidence of all acts dating back to the 1994 settlement agreement, including the acts described in the majority and dissenting opinions and more. Considering all these facts, the jury found that four of the Petitioners failed to prove liability. Because these Petitioners failed to reach the damage question, the court found that the damage limitation did not affect their outcomes. This harmless error determination was logical, factbound, and has no ramifications beyond the instant case.

Petitioners also argue that the jury might have considered the facts concerning the earlier incidents differently had the jury known it could award damages for them. The jury instructions and the verdict form, however, did permit the jury to consider these acts for the purposes of liability. Nevertheless, the issue arises only because of the retroactive application of Morgan and will not recur. With Morgan in hand, the district courts will never again fashion instructions and verdict forms based upon pre-Morgan case law. Thus, this unique issue presents no occasion for this Court to resolve a matter of national importance.

Petitioners also take issue with the court's ruling that the only acts for which the jury could have found liability in Webb's case were the discrete acts relating to the so-called McCardle incident. Specifically, Petitioners disagree with the court's decision to discount the non-discrete, environment acts that occurred within the statutory period. *See* Mems, 327 F.3d at 787-88 (Pet. App. 50-51). The court discounted these acts because they were experienced by other Petitioners as well and, in their cases, the jury found that the City took prompt and

effective remedial action. *Id.* at 785 (Pet. App. 46-47). Accordingly, the court found that only the discrete acts relating to the McCardle incident, which occurred within the statutory period, distinguished Webb's case from the others. *Id.* Again, the court's analysis was logical, fair, and factbound.

Finally, in a rather perplexing argument, Petitioners suggest that Morgan somehow mandates a reversal of the district court's decision to exclude their expert witness as a discovery sanction. Petitioners apparently argue that the district court lacked the foresight to shun then-binding precedent in favor of the to-be-anticipated Morgan decision, and thereby forced them to violate the pretrial order. Further, Petitioners continue to misrepresent the facts, asserting that they went to see Dr. Taborn in secret to "narrow" the scope of his testimony. To the contrary, the court of appeals rejected this representation, finding that Dr. Taborn's notes of the meetings include "factual allegations and symptoms not in Dr. Taborn's other reports." Mems, 327 F.3d at 780 (Pet. App. 35). In short, Petitioners' attempt to use the discovery sanction to establish a conflict with Morgan falls flat.

In sum, the opinion of the court of appeals does not conflict with Morgan, and raises no important question of federal law. The majority and dissenting opinions agreed that, under Morgan, the district court had applied the wrong legal analysis for the damages period. The majority found it was harmless error under the unique facts of the case; the dissent would have remanded for a new trial. Because this disagreement was factbound, the decision has no broader importance.

II. The District Court's Evidentiary Rulings Did Not Depart from the Usual and Accepted Course of Judicial Proceedings.

The district court's evidentiary rulings, which the court of appeals unanimously affirmed, do not call for this Court to intervene and exercise supervisory power. Petitioners advance no grounds to conclude that the court of appeals sanctioned a departure from the usual and ordinary course of judicial proceedings. To the contrary, the court of appeals simply applied the deferential standard of review long established in the Eighth Circuit. *See* Mems, 327 F.3d at 780 (Pet. App. 37) ("Appellants must show that the district court abused its discretion and that the ruling was prejudicial to the point of producing a different result.") (citing Bevan v. Honeywell, Inc., 118 F.3d 603, 612 (8th Cir. 1997)). To demonstrate that the court of appeals merely reviewed and ruled upon perfectly ordinary evidentiary disputes, and to correct Petitioners' various misstatements of fact, the City submits the positions it advanced below.

A. The Ness photograph.

Petitioners claim they perceived a photograph posted in Station 20, showing Captain Ness and another firefighter extending their middle fingers to the camera, to be an act of racial harassment. Petitioners proffered the picture as evidence in support of the subjective element of their claim, specifically, that the picture said to them: "Fuck you, nigger." It was undisputed that these words were never in fact uttered, and that no racial slurs occurred at Station 20 after the 1994 settlement. The City moved, under Rule 403 of the Federal Rules of

Evidence, to exclude the photograph or, alternatively, to preclude Petitioners from testifying that it communicated a racial slur to them. The City objected to the attempt by Petitioners to inject perhaps the most explosive of all racial epithets into evidence by testifying that they inferred it from the photograph.

Ruling on the evidence as it was proffered pretrial, the district court found that Petitioners' attempt to introduce the photograph as a racial slur, to prove up the subjective element of their claim, was classic Rule 403 evidence. At trial, Petitioners invited the court to revisit its ruling. The district court found that the representations of Petitioners' counsel at trial were "dramatically different" than the pretrial submissions, indicated that it had already ruled on the basis of the record previously submitted, and declined the invitation to reconsider.

Petitioners then offered mid-trial, for the first time, a second reason for introducing the photograph, that is, that it was a catalyst for later events. In light of this new proffer, the district court modified its ruling. The judge permitted Petitioners to elicit testimony that there was an offensive posting on the bulletin board, that Ness was disciplined for allowing the posting to occur, and that events followed therefrom. The judge permitted Petitioners to testify that they complained about the photograph and that, as a result of Ness' reprimand, "the atmosphere got really, really, thick." Additionally, Petitioners and their counsel succeeded in informing the jury that Ness was in the picture, and that they perceived it to be an act of racial harassment.

The district court was well within its sound discretion to exclude the photograph based upon the inflammatory purpose

for which it was originally offered. A judge must make evidentiary rulings based upon the purpose for which the evidence is offered. When Petitioners later added that they needed the photograph for an additional purpose, the district court fairly and reasonably modified its ruling to accommodate that need. Moreover, Petitioners have failed to meet their burden of proving that, in light of all the evidence that did come in on the subject, the exclusion of the photograph itself was "so prejudicial that a new trial would likely produce a different result." *See* Bevan, 118 F.3d at 612.

B. Barry Harrison's furniture at Station 18.

Petitioners argue that the trial court erred in excluding evidence concerning a "noose" allegedly carved into a piece of furniture owned by Barry Harrison. Petitioners sought to introduce testimony that Mems and Khaliq had seen the damaged furniture. They offered the evidence for the purpose of establishing that the harassment they experienced was pervasive and severe, and that the City failed to take prompt remedial action. Petitioners failed to preserve the issue for review, however, because they made no offer of proof about what the City did or did not do in response to the alleged vandalism.

Further, Petitioners misstate the law to suggest that evidence of co-worker harassment is always relevant and always admissible. Neither case Petitioners cite, Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999), or Schwapp v. Town of Avon, 118 F.3d 106 (2nd Cir. 1997), considered a set of facts like those before the district court, and neither case holds that a

trial judge must categorically reject Rule 403 as null and void where co-worker harassment is alleged.

In Schwapp, the plaintiff offered evidence that the same immediate supervisors who had harassed him also made racially derogatory comments to others in the same police station. Schwapp, 118 F.3d at 108-09. Reversing summary judgment, the court held that the "mere fact that Schwapp was not present when the racially derogatory comment was made" – the sole basis for the trial court's ruling – "did not render that comment irrelevant." *Id.* at 111. Likewise in Carter, the plaintiff was told that degrading graffiti about her was written in the men's restroom at her workplace. 173 F.3d at 697. Reversing summary judgment, the Carter court ruled the graffiti was relevant, citing Schwapp for the proposition that evidence of comments made outside plaintiff's presence is allowable. *Id.* at 701 n.7. Thus, evidence of harassment occurring outside the plaintiff's presence must not be automatically excluded. But neither must it be blindly admitted. The cases do not hold, as Petitioners would have it, that evidence of co-worker harassment universally circumvents Rule 403. Rule 403 rulings are factbound and must be reviewed as such.

In making their rulings, neither Schwapp nor Carter had occasion to consider the probative value of alleged harassment to a co-worker who, like Harrison, works (1) in a different facility in another part of town, and (2) with a different set of co-workers and immediate supervisors. These distinctions are all the more significant in light of the fact that Petitioners made no offer of proof as to the identity of Harrison's alleged harasser. Thus, Petitioners made no showing that the vandalism was relevant to their own hostile environment claims, which

generally alleged hostility from the A shift personnel at Station 20.

In sum, based on the offer of proof before it, the district court did not abuse its discretion in excluding the evidence. Further, Petitioners did not establish a likely different outcome if a new trial were granted because they made no offer of proof regarding the City's remedial response to the alleged vandalism.

C. Captains' conflict regarding window washing schedule.

The district court did not abuse its discretion in excluding the testimony of a conversation between B shift Captain DuBois and A shift Captain Ness. DuBois testified that Ness called him a "fucking idiot" in a dispute about the schedule for washing the station windows. Petitioners argue the hostility toward their captain was somehow evidence of racial hostility. The argument is a meritless half-truth because, on the very page of the transcript to which they cited, DuBois confirms that the confrontation took place prior to the June 1994 settlement agreement. It was never disputed that evidence of racial hostility occurring prior to the settlement should be excluded. Accordingly, *with the assent of Petitioners' counsel*, the district court excluded this evidence of pre-settlement acts. DuBois then proceeded to testify at length about how he felt the A shift subjected him to the same racial hostility as his crew.

D. Witness attacking the character of Chief Zilliox.

Petitioners argue that they were denied the opportunity to prove up their prima facie case when the district court

excluded the rebuttal testimony of Rodney Edwards on the subject of Chief Zilliox's alleged racial bias. If, as Petitioners apparently admit, Edwards' testimony about his unrelated incident with Chief Zilliox was properly part of their prima facie case, they can blame only themselves for not offering it in their case in chief. The district court did not abuse its discretion when it ruled that the testimony "may or may not have been relevant in the [Petitioners'] case in chief, but it is not appropriate for the rebuttal phase."

E. Debra Giles Smith's damages testimony.

Petitioners object to the exclusion of Debra Giles Smith's testimony concerning the effects of alleged discrimination on their marriage. Since Smith failed to prove up his liability claim, the exclusion of damages testimony did not prejudice him. Moreover, Giles Smith did testify about how the alleged discrimination affected their home life and, indeed, testified that it led to their divorce. The Court denied the City's motion to strike this testimony, but instructed Petitioners' counsel to move on. Because Petitioners' counsel did not object to that ruling at trial or make an offer of proof, and the ruling was not plain error, the objection was waived. *See* McKnight By and Through Ludwig v. Johnson Controls, Inc., 36 F.3d 1396, 1407 (8th Cir. 1994).

F. Allegations of drug use by white firefighters.

Petitioners argue that the district court improperly excluded evidence that the City treated a white firefighter accused of drug use differently than it treated Smith. The district court correctly found that Petitioners' own testimony of

what occurred was hearsay and that they failed to identify any witnesses with foundation to testify. Additionally, they never made an offer of proof to show what the testimony from a witness with proper foundation would have been, and thus, again, failed to preserve the issue for appeal.

CONCLUSION

For the foregoing reasons, the City of Saint Paul respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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